THE CONTEMPORARY COUNTER-TERRORISM MODEL OF INTER-STATE CO-OPERATION

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ABSTRACT

The phenomenon of terrorism has been a permanent fixture in human history. The atrocities however, of September 11 illustrated the impact of such attacks on the international system of law and triggered questions as to the existence of a legal framework capable of addressing international terrorism. The present thesis examines the existence of particular international counter-terrorism models to deal with such a multifaceted phenomenon.

I have identified the following counter-terrorist models in the field of international law and relations: *unilateral internal; inter-State co-operation suppressionist; unilateral external* and; *centralised Security Council* model. The first is prevalent in the absence of a particular treaty and where relevant instruments provide legislative and enforcement authority to incumbent States. The second has been predicated on bilateral and multilateral treaties entailing co-operation at various levels between States, but it has been also necessitated de facto in the context of recent Security Council resolutions. The unilateral external model has been predominantly invoked by the USA to justify the use of force against terrorist targets. Finally, the centralised Security Council model has come about as a result of the 9/11 attacks and through which the Council adopted particular resolutions that have given it authority to address in binding manner specific facets of anti-terrorist policy at the international and domestic level.

The events of September 11 posed questions as to whether new international norms are needed in order to cope with terrorism. It is my belief that what is needed is the effective and consistent application of existing norms rather then anything else.

TABLE OF ABBREVIATIONS

AEDPA	Anti-Terrorism and Effective Death Penalty Act
AJIL	American Journal of International Law
BFSP	British Foreign and Security Papers
BYIL	British Yearbook of International Law
CAT	Committee Against Torture
CATOC	Convention against Transnational Organised Crime
CE	Common Era
CFSP	Common Foreign and Security Policy (EU)
CIA	Central Intelligence Agency
Columbia J. Trans. L	Columbia Journal of Transnational Law
Cornell ILJ	Cornell International Law Journal
CPA	Coalition Provisional Authority (Iraq)
CSIS	Canadian Security Intelligence Service
CTC	Counter-Terrorism Committee (UN)
DEA	Drug Enforcement Agency (USA)
Doc.	Document
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council (UN)

EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETA	Euskadi Ta Askatasuna- Basque Homeland and Liberty
ETS	European Treaty Series
FAI	Federación Anarquista Ibérica
FARC	Revolutionary Armed Forces of Colombia
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
G.A.	General Assembly
GAO	General Accounting Office (USA)
GCC	Gulf Cooperation Council
GWOT	Global War on Terrorism
Harvard J L & Public Policy	Harvard Journal of Law and Public Policy
Houston J. Int'l L	Houston Journal of International Law
HRC	Human Rights Committee
HRW	Human Rights Watch
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMF	International Monetary Fund
IMO	International Maritime Organisation
IMRO	Internal Macedonian Revolutionary Organisation
INCB	International Narcotics Control Board
INTERPOL	International Police Organisation
IRA	Irish Republican Army
JHA	Justice and Home Affairs (EU)
IW	Information Warfare
JCE	Joint Common Enterprise
KYC	Know Your Client
KLA	Kosovo Liberation Army
LEHI	Fighters for the Freedom of Israel
LNOJ	League of Nations Official Journal
Loy. LA Int'l & Comp.	Loyola of Los Angeles International & Comparative

L. Rev.	Law Review
MLAT	Mutual Legal Assistance Treaty
MLR	Modern Law Review
NATO	North Atlantic Treaty Organisation
Naval L. Rev.	*Naval Law Review*
NGO	Non-governmental Organisation
NLM	National Liberation Movements
Ohio NULR	Ohio Northern University Law Review
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control (USA)
OIC	Organisation of the Islamic Conference
OJ	Official Journal (EC)
OSCE	Organisation for the Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PKK	Kurdish Workers Party
PLO	Palestinian Liberation Organisation
RAF	Red Army Faction
Res.	Resolution
SA	South African (RSA) Supreme Court

SC	Security Council
TIAS	Treaties and Other International Acts Series (USA)
UKHL	United Kingdom House of Lords
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGAOR	United Nations General Assembly Official Records
UNTS	United Nations Treaty Series
USC	US Code
WMD	Weapons of Mass Destruction
WW II	World War II

INTRODUCTION

Prior to the events of 9/11 the topic of terrorism was not on the top of domestic and international agendas. While not being a peripheral matter, it certainly did not call for a reappraisal of the existing norms of international law. It was regulated in thematic fashion on the basis of treaty law dealing with the particular manifestations of terrorist activity. The biggest challenge for pre-9/11 political theorists and international lawyers was to make a fine distinction between terrorist violence and other forms of politico-ideological violence, particularly struggles of self-determination, as well as to come up with a universally acceptable definition of terrorism at the international level. While these issues are still relevant, the post-9/11 agenda has evolved to encompass other concerns, especially the availability of responses to terrorism, whether through recourse to the use of armed force, obligatory mechanisms related to domestic banking and financial institutions, sharing of intelligence information and other binding forms of inter-State co-operation. Following the attacks of 9/11 there was a multiplication of efforts to develop responses to terrorism at the global and regional level, with the United Nations assuming a leading role in the fight against terrorism.

My focal point in this thesis are responses to international terrorism; whether unilateral, multilateral, or on the basis of Security Council resolutions. My overarching aim is to identify previous responses and assess the various conflicting claims as to the prevailing international counter-terrorism model. Contemporary terrorist threats challenge the current international law framework in many respects and trigger questions as to the whether the prevailing attitude towards terrorism has changed. Is the unilateral external model of the use of force against terrorism a new counter-terrorism model? The controversial application of the *jus ad bellum* and *jus in bello* principles of international law have acquired particular importance since the September 11 atrocities[1] against the US and the subsequent

[1] On September 11, 2001, hijacked aircrafts were flown into the World Trade Centre in New York, killing 3000 people. Large scale terrorist operations followed: On October 12, 2002 a bombing in Bali caused the death of 202

responses that followed. There are currently two opposing schools of thought with regards to the prevailing counter-terrorism model, both related to the fundamental question as to how terrorism should be characterised. According to the first school of thought terrorism constitutes a criminal enterprise calling for a 'law enforcement' approach, while the other perceives contemporary terrorism as 'acts of war', bringing into play the law of war, with both its branches: the *jus ad bellum* and the *jus in bello.* It has been argued that September 11 was a crucial date, which called for a reconstructing of international law. Although the scale of the atrocities and the military responses that followed indicate that September 11 was indeed a crucial date, with my thesis I argue that the events of September 11 and the subsequent responses more than anything else triggered a new determination to ensure the universal application of existing counter-terrorism norms. In this respect they led to the development of the centralised Security Council counter-terrorism model. By deconstructing the contemporary counter-terrorism models my aim is to reaffirm the relevance of international co-operation in suppressing terrorism.

The scale and effects of the attacks of September 11 illustrated the ability of non-state actors to cross national borders and cause mass casualties. Certainly the realisation of the real threat posed by contemporary international terrorism changed the prevailing attitude at least of the most powerful states[2]. Although terrorism (including transborder terrorism) is not a new phenomenon, large-scale international terrorism, in the context of highly complex and increasingly global networks, constitutes an entirely new challenge to the system of collective security as represented by the United Nations organization. By its very nature, transborder terrorism cannot exclusively be dealt with within the

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people, on March 11, 2004 in Madrid, 200 people died from bombs exploded, in London on the 7th of July 2005, 42 people were the victims of terrorist attacks. See: *New York Times*, (Oct. 4 2004), p. 8.

[2] See: Rostow, N., Before and after: the changed UN response to terrorism since September 11, 35 *Cornell International Law Journal* (2002), p. 475.

framework of an international order defined by the nation-state. Naturally, effective strategies cannot be developed by states in isolation from each other.

My hypothesis from the outset was that the contemporary counter-terrorism model is a suppressive (reactive) rather than a proactive one based on inter-state co-operation. I use the term model to discuss the international responses to terrorism and the various forms of co-operation adopted by the majority of states. Where, therefore, a State alone, apart from all other or the majority of States, applies either preventive or suppressionist action in a particular case, this is not to be regarded as a model, as in order to establish a model significant consensus is required. I must explain that the suppressionist model is not simply exhausted by an immediate reaction to a terrorist attack. Rather, its contemporary existence is predicated also on substantial preventive action because of the way domestic as well as international criminal justice works. Thus police investigation and cooperation where a crime is in the stage of being planned would fall within the suppressionist model, whereas in cases where a State is suspected of accumulating weapons of mass destruction (WMD) under the vague speculation that it might use it against another State, any action taken in that regard would be preventive. Similarly, where States agree to set down binding banking/financial institution regulations in order to avoid the end result brought about by terrorist financing in general, and not in connection to a specific terrorist group, this would also fall with preventive action. However, this should not be regarded as a concrete preventive approach to terrorism. A concrete preventive approach would be one that attacks the root causes of the phenomenon and prevents it from occurring in the first place.

The thesis runs as follows: Chapter one offers an introduction to the phenomenon of terrorism and the resulting 'war on terror'. The chapter is divided into three main sections. My aim in part one is to conceptualise terrorism as a phenomenon before I examine in part two the gradual evolution of international efforts to understand, categorise, criminalize and counter terrorism. Through a brief historical introduction to the phenomenon of terrorism my aim is to demonstrate the different varieties of terrorism. The multifaces of the phenomenon will later explain the impossibility of reaching a general consensus on the definition of the term. In the second part of the chapter I proceed to an examination of the existing international counter-terrorism measures to fight international terrorism. Despite the fact that terrorism operates both at the national and international law the chapter is limited to an examination of international instruments, which deal with terrorism having an international

dimension. Since the early twentieth century acts of terrorism by non-state actors called for the attention of the international community to adopt instrument towards eliminating international terrorism. From the 1960's onwards, terrorism took on a new international element through the perpetration of cross-border civil aviation offences (hijacking, etc). Such an internationalisation of terrorism led to the adoption of international measures to combat it. The subsequent treaties that followed criminalized in thematic style the various offences contained therein and elevated them to crimes of international relevance. The model of that era could best be described as an *inter-state cooperation suppressionist model* as the thematic treaties of that era were premised on a suppressionist approach, which was also endorsed by General Assembly resolutions of the time. This was a suppressionist model because it made provision only for immediate post-terrorist countermeasures, such as the delineating jurisdictional competences, extradition and mutual legal assistance procedures, political offence exceptions, etc. No doubt, the inclusion of a duty in these States upon States to criminalize the acts described therein could be characterised as preventive, but this is hardly evidence of a concrete preventive approach. I argue from the perspective of State practice that the prevailing model of that era is best described in terms of suppression, notwithstanding the fact that there is a strong bilateral treaty system relating to extradition and mutual legal assistance. Nonetheless, this bilateralism, only serves to illustrate that inter-state co-operation matures only at the stage where the alleged offender has been apprehended. The adoption of specific anti-terrorism conventions was evidence of the unwillingness of states to deal with terrorism as a phenomenon largely because of the 'political offence' exception. Such unwillingness seems to have gradually been abandoned by the adoption of the more recent UN anti-terrorism conventions, the Convention on Terrorism Bombing and the Terrorist Financing Convention. However, both conventions do not really depart from the previously existing model. Instead they represent a more effective rendition of the suppressive counter-terrorism model based on inter-state co-operation.

Following the events of September 11 however, it became obvious that terrorism appears to have a much more lethal face as it has become widespread, institutionalised, technologically advanced and global in its consequences. The changing face of terrorism has given rise to the question as to whether responses to it should be viewed within a warfare framework. In the last part of the chapter I introduce the so-called 'war on terror' doctrine launched in the aftermath of the events of 9/11 and its legal implications for international law. My aim in that last part of the chapter is to indicate the

consequences of treating the fight against terrorism under the 'war on terror' doctrine. To accept the 'war on terror' doctrine as a war on law carries the real risk of creating classes of enemies who are actual or potential threat and opens the way to military action against broadly defined enemies[3].

Terrorism is a phenomenon that has taken many different forms throughout history. Moreover, the term terrorism is such a broad term that has not been used consistently by states. Such facts explain the impossibility of reaching a universal definition of terrorism. The absence of an accepted international law definition is perceived by some commentators as the main reason for the inadequacy of international law's ability to combat terrorism[4]. The lack of an international definition of terrorism is the subject matter of my second chapter. The most important questions with regards to the lack of a generally accepted definition of terrorism is whether the lack of definition means that states can act as they wish on a subjective notion of terrorism and whether such a lack of an accepted definition becomes a matter of operational concern for the international legal order. Has the failure to conclude on a definition serious consequences in practice?

My argument is that the lack of a generally accepted definition of terrorism does not result to the paralysis of legal developments. Although the term terrorism has strong political significance, the absence of a definition did not prevent the adoption of specific counter-terrorism conventions addressing particular (as well as non-particular) manifestations of the phenomenon. All these instruments provide the legal tools to address conduct that we might refer to as acts of terrorism. The situation however is different with regards to domestic definitions of terrorism as a domestic anti-terrorism statute must provide a precise definition of terrorism. The lack of precise definitions of terrorism in the domestic level explains more than anything else the poor enforcement of existing norms.

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[3] See: Lowe, V., Clear and present danger: responses to terrorism, 54 *ICLQ (*2005), p.p. 185-196.

[4] Nanda, V., The role of international law in combating terrorism, 10 *Mich. St, U. DCL Int. L (* 2001), p. 603.

Following the atrocities of September 11, and the military action against Afghanistan a new model of counter-terrorism seems to emerge. The horrendous attacks of 9/11 demonstrated to the world the immense destruction that armed groups of private individuals are capable of causing. This brought to the forefront an important question regarding the unilateral use of force against non-state actors: when is it lawful for states to exercise their right of self-defence in response to attacks by private actors operating from abroad? Is the *unilateral external model* an emerging new counter-terrorism model? This is the question addressed by means of the third chapter, with the aim to support further the inter-state suppressionist model for which I am advocating at the present thesis.

More specifically, in chapter three I examine the application of Articles 2(4) and 51 UN Charter to terrorism, and whether the latter can ever be equated with an 'armed attack'. Certainly, such a position would have been untenable prior to 9/11, but following Security Council Resolution 1368, a day after 9/11, it became evident that the Council was determined to describe extreme terrorist attacks as manifestations of 'armed attack'. The lack of a theoretical basis, however, underpinning such a notion is problematic in many respects, particularly since it does not answer the question whether a non-State entity is, and in what way, capable of launching an armed attack. If it can, who will be the object of the victim state's countermeasures, which in all probability will involve substantial use of armed force? Are states now permitted to use force in response to terrorism committed by non-state actors? Looking at the reaction of states to the events of September 11 and the military action against the Taleban and Al –Qeada it seems that there is a paradigmatic shift in the international community's understanding of the law of self-defence. Can terrorism post-September 11 be an 'armed attack' under the *ius ad bellum* so as to trigger applicability of the ius *in bello*? If so, to what extent is anticipatory self-defence applicable in the case of a qualifying terrorist attack? All these concerns have forced the ICJ in its Advisory Opinion in the Palestinian Wall case to argue (14 votes to 1 in favour) that Article 51 UN

Charter concerns only inter-State instances of armed force and is thus inapplicable to terrorist attacks[5]. Moreover, given the fact that resolution 1368 is a context specific instrument – i.e. adopted in relation to 9/11 alone – I can ascertain that although the link between the UN Charter's use of force provisions and terrorism is a new and real approach it is wholly unclear whether other terrorist acts can ever be quantified as constituting armed attacks.

The US, and Israel before it, is arguing that it has the right to employ armed force in a pre-emptive capacity, and to a large degree this is what took place with the Iraq invasion of 2003. I argue that the pre-emptive position finds no support in international practice and although it may be implied in Security Council language contained in post 9/11 resolutions, it is in fact wholly rejected by the international community. Indeed the unilateral external model invoked by the USA to justify pre-emptive strikes against alleged terrorist targets has not met with any degree of consensus by the international community. The emerging model in the sphere of terrorist-related use of force is suppressionist, as is use of force in general under Article 51 UN Charter irrespective of particular deviations.

Additionally, chapter three briefly considers the question of whether a terrorist act can cross the threshold of severity so as to trigger the application of Protocol II to the Geneva Convention. Following the conclusions reached in my third chapter and the overall argument of the thesis, the question as to whether a terrorist act can bring about an internal armed conflict is considered only as a residual possibility.

Having ascertained in my previous chapter the current legal position according to which the 'war on terrorism' is not a war in the legal sense, I proceed in my last chapter to a discussion of recent regional and international developments in relation to terrorism, which further support my argument that the

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[5] *Advisory Opinion*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), para. 139.

contemporary counter-terrorism model is a suppressionist one based on inter-state co-operation. I rely heavily on recent UN action against terrorism in order to demonstrate that the *Centralised Security Council suppressionist model* is the one currently accepted by the international community of states. Such a model is advocated by recent Security Council resolutions, the creation of mechanisms and bodies such as the Counter-terrorism Committee and regional efforts to deal with terrorism. Terrorist financing encompasses a significant array of measures, some of which were adopted prior to the events of 9/11, particularly through the 1999 Terrorist Financing Convention, but which were really consolidated and made universal by Security Council Resolution 1373, immediately following 9/11. All such counter-terrorism measures reaffirm the view that international terrorism should be best addressed through international co-operation.

Counter-terrorism measures whether they are perceived as 'war' or as 'law enforcement' measures have direct implications for human rights. The human rights implications of terrorism and especially of terrorist attacks such as the September 11 go far beyond the scope of my thesis to include the violence and discrimination witnessed in the aftermath of September 11, as well as the civil liberties implications of potential security measures. However, in the last chapter I highlight and discuss the human rights implications arising from the enforcement of the contemporary counter-terrorism model.

CHAPTER 1

INTRODUCTION TO THE PHENOMENON OF TERRORISM: FROM THE EARLY INTER-STATE SUPPRESIONIST MODEL TO THE 'WAR ON TERROR'

INTRODUCTION

Depending one one's interest and academic training, there are many perspectives to a single phenomenon, whether social, natural, or other. The same is true of violence. Violence itself is further distinguished and categorized on the basis of victims and perpetrators; domestic, political, ethnic, religious and other forms of violence spring to mind[1]. All such emanations of violence establish a variety of interesting prisms; sociological, criminological, political/international relations, legal and, with the plethora of current scientific and social methods, many others. When the law, domestic or international, attempts to regulate social phenomena, such as violence, it does so because: a) it is deemed that the existing de-regulation regime exposes persons and property to risk, and; b) there is consensus on the existence of both the risk and available enforcement measures. In the international arena, at least, foreseability for the regulation of risk is lacking, and thus all responses are premised on re-action rather than pro-action. A good example is the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft[2], which was hastily adopted only after a multitude of incidents endangering civil aviation were perpetrated, and which were often greeted with amusement by the press and the public, and with national authorities not quite certain if they should prosecute and, if so, under what laws. Since the Second World War hostage taking of international protected persons

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[1] See: Wilkinson, P., *Terrorism versus democracy, the liberal state response*, (Frank Cass 2000), p. p. 20-21.

[2] 2 *ILM* (1963), 1042.

has developed to an issue of major concern. A proliferation of incidents, such as the Entebbe raid[3] and the American hostage-taking in Iran[4], led the international community to adopt binding instruments condemning and criminalizing hostage taking[5]. The adoption of the specific anti-terrorism conventions following particular incidents of major concern for the international community is indeed evidence of the preferable suppressionist approach. Such a suppressionist counter-terrorism model of inter-state co-operation was the dominant model before September 11.

The present chapter is divided into three main sections. After conceptualizing terrorism, I proceed in part two of the chapter to an examination of the gradual evolution of international efforts to counter-terrorism. Indeed prior to the events of September 11, the General Assembly of the United Nations through the work of the Sixth Legal Committee developed treaties that encouraged states to criminalize some of the acts that are commonly carried out by terrorist. Most of the conventions do not refer to terrorism explicitly. In general terms the international conventions seek to utilize domestic criminal law to eliminate international terrorism rather than to establish international crimes themselves. The adoption of the two more recent UN conventions on terrorism, the Bombing Convention and Financing of Terrorism Convention indicate a paradigmatic shift of the international community's attitude towards terrorism. In contrast to the earlier treaties dealing with specific targets both the Terrorist Bombing and the Financing of Terrorism conventions demonstrate a will to declare the illegitimacy of terrorism in all circumstances. However, both conventions do not really depart from the suppressionist approach but indicate a more effective rendition of the suppressionist model of inter-state co-operation.

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[3] See: Harris, D. J., *Cases and material on international law*, 5th edition, (Sweet and Maxwell, London, 1998), p. p. 909-911.

[4] US Diplomatic and Consular Staff in Tehran Case, United States of America v Iran, *ICJ* Reports, 1980, see: ibid, p. 358.

[5] See: Rehman, J., *International human rights: a practical approach*, (Pearson Education Limited, 2003), p.452.

In September 2001 the United Nations Security Council declared that acts of international terrorism constitute on of the most serious threats to international peace and security in the 21st century[6]. Thus, the events of September 11 converted terrorism from an issue of on-going concern for the General Assembly to an issue threatening international peace and security. They also gave rise to the 'war on terror' doctrine. The last part of the chapter introduces the idea of a 'war on terror', which is further discussed in chapter three.

[6] S.C. Res. 1377, Annex, U.N. Doc.S/RES/1377, 12 November 2001.

PART ONE

1. THE CONCEPT OF TERRORISM: HISTORICAL DIMENSIONS

The phenomenon of political violence has been a permanent fixture in human history as a method employed by emperors, kings, religious[7] and ethnic leaders as well as revolutionaries, seeking to make political protest to, or to secure certain political behaviour by States. Some of the earliest recorded examples are the secret brotherhoods[8], autonomist movements such as the IRA[9], or the Armenian movement against the Turks after the genocide this ethnic group suffered in 1915-17[10]. Although there are great differences as far as the character and the tactics of terrorist operations are concerned, the basic issue remains the same: violence reappears as the 'natural' answer to social injustice, oppression and social discrimination.

It is perhaps helpful from the outset to define what I mean by the term 'terrorist organization'. An organization is termed terrorist on the basis of both objective and subjective factors. As far as the former is concerned, a typical terrorist organization advocates in favour of and is committed to a shared

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[7] Rapoport, D., *The morality of terror: religious and secular justifications*, (Pergamon, 1982).

[8] Examples of prototypical terrorist movements are the following: The Sicarii, an extreme group of a Jewish Zealot sect which waged a campaign of terrorism between AD 63-73; the Assassin sect; Shi'ite Ismaili brotherhood emerged at the end of the 11th century; the Red Spears in China; the Thugs, an Indian sect; and the Ku Klux Klan in the USA. For an extensive discussion on secret and religious brotherhoods, see Laqueur, W., *The age of terrorism*, (Little Brown, 1987), pp.13-15. See also, Rapoport, D., Fear and trembling: terrorism in three religious traditions, 78 *American Political Science Review* (1984), p. 658. See also: Gupta, H., A Critical study of the Thugs and their activities, 38 *Journal of Indian History* (1959), p. 167, and Horsley, R., The Sicarii: Ancient Jewish 'terrorists', 59 *Journal of Religion* (1979), p. 435.

[9] See: Kelley, K. J., *The longest war, Northern Ireland and the IRA*, (Lawrence Hill & Co., 1988), p. p. 29-40.

[10] O'Sullivan, N., *Terrorism, ideology and revolution: the origins of modern political violence*, (Westview Press, 1986), p.p.115-132.

political value[11], is secret, small in size so as to ensure adaptability and flexibility, does not engage in large offensive operations, but rather perpetrates small-scale clandestine violent acts. Whereas these elements are more or less common to all terror organizations, their aims differ substantially. Hence, the PKK and Hamas[12] demand through violence the creation of independent States, and as a result are larger in size than all other organizations. The subjective factor is much more complex. It is predicated on the designation by a particular country[13], or a group thereof through the United Nations[14], of a specific group as a terrorist organization. Whereas such designation may rest on the objective criteria identified above, it is usually arbitrary on the basis of national self-interests, and thus varies from country to country. This further explains the impossibility of reaching a global consensus regarding a single definition[15].

Based on their underlying political motivation or ideological cause[16], terrorist can be categorized in those seeking political self-determination[17], ideological terrorists[18], single-issue terrorist[19], and religio-

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[11] Post, J., Sprinzak, E., and Denny, L., The terrorists in their own words: Interviews with 35 incarcerated Middle Eastern terrorists, 15 (1) *Terrorism and Political Violence* (2003), p.p. 171–184.

[12]See: Asser, A.,Who are Hamas? BBC News 6 June 2003, www. Neaws.bbc.co.uk/1/hiu/world/middle_east/

[13] E.g. the 1996 US Anti-Terrorism and Effective Death Penalty Act (AEDPA), 18 USC § 2339B. The AEDPA authorises the Secretary of State to designate a foreign organisation or group as a terrorist organisation. The same is also true of sec. 3 of the UK 2000 Terrorism Act, which gives the Secretary of State authority to designate a 'proscribed' organisation.

[14] In this case through the combined work of the Counter-Terrorism Committee, established through SC Res. 1373 (28 Sep. 2001) and the Security Council itself.

[15] For the impossibility of reaching a generally accepted definition of terrorism see chapter 2 of the thesis.

[16] See relatively: Schmid, A., and Jongman, A. J., *Political terrorism: a new guide to actors, authors, concepts, databases, theories and literature*, (North Holland Publishing Company, 1988), p.p. 39-56.

[17] Examples include the IRA and the ETA organisations. See: Townshend, C., *Political violence in Northern Ireland*, (Gill and Macmillan, 1981). Also: Whittaker, D. J., *The terrorism reader*, (Routledge, 2003), p.p. 101-110. Also see: supra note 9, p.p. 29-40.

[18] Ideological groups are those seeking to change the political status quo to an extreme right or left model. Some indicative examples are: the Red Army faction and the Red Brigades. See relatively: supra note 1, p. 20. Also: Hoffman, B., *Right wing terrorism in Europe*, (RAND Corp., 1983), p. p. 16-27.

[19] This is employed by groups obsessed with the desire to change a specific policy, or practice within the target society, rather than with the aim of political revolution. See relatively: Sperling, S., *Animal liberators: research and morality*, (University of California Press, 1988

political terrorists[20]. The profound differences between the aforementioned groups of terrorists were in the past clearly recognized. However, this is less true today with the important changes that have taken place in the character of terrorism. Indeed the model of political violence that emerged from the socio-political era of the 1960's and 1970's has now largely faded away, or has been eradicated in Western Europe and most of Latin America. Since the attacks of 9/11 the world has witnessed the maturity of a new phase of terrorist activity, the so-called *jihad* era of violent religious fundamentalism, spawned by the Iranian Revolution of 1979, as well as by the Soviet defeat in Afghanistan shortly thereafter. The powerful attraction of religious and spiritual movements has overshadowed the nationalist or leftist revolutionary ethos of earlier terrorist phases (though many of those struggles continue), and it has become the central characteristic of a growing international trend. It is perhaps ironic that, as Rapoport observes, the forces of history seem to be driving international terrorism back to a much earlier time, with echoes of the behaviour of 'sacred' terrorists, such as the Zealots-Sicarii, clearly apparent in the terrorist activities of organizations such as al-Qaeda and its associated groups. Internationally, the main targets of such terrorists are the United States and the US-led global system. Like other eras of modern terrorism, this latest trend has deep roots and given the relevant historical patterns, it is likely to last at least a generation, if not longer. The *jihad* era is animated by widespread alienation combined with elements of religious identity and doctrine — a dangerous mix of forces that resonate deep in the human psyche.

). Also: Davidson, G. S., *Combating terrorism*, (Routledge, 1990), p. 7; see also *Militant Activism and the Issue of Animal Rights*, Commentary No.21, Canadian Security Intelligence Service, *CSIS*, 1992. Also: Bragg, R., Abortion clinic hit by two bombs, *New York Times*, (January 30, 1998); see also Woman gets twenty year sentence in attacks on abortion clinics, *New York Times*, (September 9, 1995); Cleninden, D., Abortion clinic bombings have caused disruption for many, *New York Times*, (January 23, 1985). For an examination on the validity of labelling such groups as terrorists, see: Monaghan, R., Terrorism in the name of animal rights, 11 *Terrorism and Political Violence* (1999), p.1.

[20] Most cited groups are the Hamas and Hezbollah. On the activity of both groups see relatively: Gus, M., *Understanding terrorism: challenges, perspectives and issues*, (Sage Publications, 2003).

Post 1990's terrorist violence, which has given birth to a more pervasive and accepted suppressionist inter-State approach, is different from ante-1990's terrorism in the following respects: a) the violent acts raise fear within the population; b) the levels of violence exceed by far that witnessed in previous eras; c) there is so much public support within like-minded populations or like-minded States that terrorist violence can afford to be indiscriminate and atrocious in nature, and; d) post-1990's terrorists operate army-style training camps and because they can recruit a limitless number of persons to their cause, they are able to operate in large numbers across a multitude of international frontiers. Thus, terrorism performance of violent acts acquires an international dimension. In an era of globalisation and increasing interdependence almost every significant terrorist campaign has an international dimension, even when it is challenging a specific government within its own territory[21]. For example the IRA raises funds in the United States, while the ETA has used French territory to plan terrorist attacks[22]. Also Al-Qaeda which is generally demands the withdrawal of western financial and military interests from Muslim countries, activates in both Western and Muslim States. In contrast with older approaches modern-day terrorism is widespread, institutionalised, technologically advanced and global in its consequences[23]. The brief history to the phenomenon of terrorism indicates the impossibility of reaching a generally accepted definition of terrorism. Any attempt to produce a definition is doomed because every terrorism is different. It's different according to history, to tradition and political culture. The historical events demonstrate that terrorism appears in various forms. The refusal to differentiate between different forms of terrorism makes definitions even more difficult to formulate. The lack of a generally accepted definition of terrorism in international law has lead to the thematic approach evident from the adoption of conventions dealing with specific manifestations of the phenomenon. In the

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[21] See: Wilkinson, P, supra note 1, p.19.

[22] ibid, p.188.

[23] Griset, P., *Terrorism in perspective*, (Sage Publications, 2003), p. p. 45-57.

following sections I discuss the gradual evolution of international counter-terrorism models developed to deal particular manifestations of terrorism[24].

[24] Falk, R., Rediscovering international law after September 11th, 16 *Temple International & Comparative Law Journal*,
(2002), p.p. 359-69. See also: Zelman, D., Recent developments in international law: anti-terrorism legislation - part two: the impact and consequences, 11 *Journal of Transnational Law & Policy,(*2002), p.p. 421-441.

PART TWO

1. THE UN SPECIFIC CONVENTIONS AGAINST TERRORISM

The international dimension of terrorism urged many states to perceive that they have a shared interest in co-operating with each other in order to suppress specific manifestations of terrorism, which they perceived to be a common threat. Starting from the least ambitious threshold of the conventions regulating highjacking in the 1960's and 1970's, the 1990's finds the international community forming and adopting new instruments, dealing with more specialized forms of terrorism with increasingly advanced language. The United Nations General Assembly has played an important role in addressing some of the more specific manifestations of international terrorism, such as airline hijacking, unlawful seizure of aircraft and hostage taking, by adopting resolutions and conventions that require States to criminalize these acts. International co-operation between States for the suppression of international terrorism was manifested by a series of agreements dealing with a crime that threatens not only human life and safety, but also the existence of every civilized society[25]. An analysis of the subject matter of the international instruments dealing with terrorism reveals that they encompass different manifestations of violence upon civil aviation[26], civil maritime navigation and sea based platforms[27], as

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[25] See: Joyner, N., Aerial hijacking as an international crime, (Oceana Publications, 1974); McWhinney, E., Aerial piracy and international terrorism: The illegal diversion of aircraft in international law, (Kluwer, 1987). See also: Evans, A., Aircraft hijacking: its causes and cure, 63 AJIL (1969), p. 695 and Aerial hijacking: what is to be done, 66 AJIL (1972), p. 819. Also: Moore, J., Towards legal restraints on international terrorism, 67 AJIL (1973), p. 88.

[26] 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 *UNTS* 219; 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 *UNTS* 105; 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 *UNTS* 177; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which extents and supplements the Montreal Convention on Air Safety, *ICAO* Doc.9518 (24 Feb. 1988).

[27] 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 Mar.1988) and the Protocol of the same date for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *IMO* Doc. Sua Conf/15.Rev.1 (1998).

well as attacks upon persons, including hostages, diplomats and other internationally protected persons[28].

Among the most notable elements of the relevant conventions is the absence of universal jurisdiction in respect of the offences prescribed therein. For example, the provisions of the Tokyo Convention[29] provide for jurisdiction on a variety of bases, such as the registration of the aircraft, the nationality of the personnel harmed, but none of these amounts to universal jurisdiction. The Hague and the Montreal conventions contain explicit punishment for the potential offender and oblige member States either to extradite or punish. However, the present author expresses her serious doubts as to the extent that States are ready to comply with the '*aut detere aut judicare principle'*, especially since neither the Hague nor the Montreal Convention contains provisions for the application of sanctions[30]. Moreover, the *aut dedere* principle is not *ipso facto* directly applicable, but requires the existence of a bilateral extradition treaty, or a declaration lodged in a multilateral convention containing the *aut dedere* principle with which the declaring State expressly consents to extradition regardless of the existence of a bilateral treaty.

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[28] 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 *UNTS* 167; 1979 International Convention Against the Taking of Hostages, UN Doc. A/Res/34/146 (1979). For a detailed analysis of the Convention, see: Bloomfield, L., FitzGerald, G., *Crimes against internationally protected persons: prevention and punishment. An analysis of the UN Convention*, (Praeger, 1975). See also: Rozakis, K., Terrorism and the internationally protected persons in the light of the ILC's Draft Articles, 23 *ICLQ (*1974), p. 32.

[29] In particular, the convention requires States parties to take such measures as are necessary to establish their jurisdiction over crimes committed on board aircraft registered by them. See Art. 3. Other provisions concern such matters as taking offenders into custody, restoring control of the aircraft to the commander and continuation of the aircraft's journey. Arts. 6-15.

[30] The ineffectiveness of the relevant international conventions in association with the numerous aerial hijacking instances during the 1960's, culminated in the adoption of bilateral and regional treaties See, for example, Cuba-US: Memorandum of Understanding on the Hijacking of Aircraft and Vessels and Other Offences: Exchange of Notes at Washington and Havana (15 February 1973), reprinted in 12 *ILM* 370 (1973) {currently not in force}. It should be noted that in its 156th Session the ICAO Council reported a sharp decline in the number of incidents of unlawful interference with international civil aviation. See Report of the Secretary General, Measures to Eliminate International Terrorism, UN Doc A 54/301 (3 September 1999), p. 7.

The necessity to suppress acts of hostage taking led to the adoption of the 1979 Convention against the Taking of Hostages. The Convention recognizes the grave nature of the offence[31] and obliges member States to define it as an extraditable offence under their domestic laws[32]. The Convention makes no provision regarding the handling of hostage situations but requires member States to take all appropriate measures[33] to ease the situation and secure the release of the hostages[34]. It is evident that both in the case of civil aviation and hostage taking the emphasis is not on the protection of the victims once these are caught in the middle of a particular incident; rather, co-operation focuses more on the criminal justice dimension thus adopting a suppressionist model. The basic model followed by the international anti-terrorism instruments is the following: a type of terrorist activity of particular concern at the time is identified; states are obliged to criminalize the conduct and impose penalties. Thus, the pre-September 11 model was utilizing international law to declare that certain acts should be criminalized in the domestic law of each signatory state.

2. THE EVOLUTION OF COUNTER-TERRORISM MODELS THROUGH THE GENERAL ASSEMBLY

The contemporary approach to terrorism by the various organs of the General Assembly bears no resemblance to its examination in the early 1970s when it was dominated by the influence of developing countries and the semantics of self-determination. Since the early 1960s, much of the

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[31] Art. 2.

[32] Art. 10(1).

[33] The current official practice of States is to refuse to yield to terrorist demands although this is not always the case in practice. See: US Counter-Terrorism Policy Statement in Paust J. J., et al, *International criminal law: cases and materials*, (Carolina Academic Press, 1996), p. 1176.

[34] Art. 3(2).

physical conduct comprising terrorist acts has been criminalized in numerous sectoral anti-terrorism treaties. Yet dealing with terrorist acts as sectoral offences fails to differentiate between privately motivated violence and violence committed for political reasons. In particular, the international community has expressed is disapproval of 'terrorism', *as such*, on a number of grounds since the early 1970s. The item was first included in the agenda of the twenty-seventh session of the Assembly in 1972, under the title 'Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes'[35]. An impressive title, no doubt, especially because the Assembly identified the need to address the 'underlying causes' of the phenomenon known as terrorism, something which may be regarded as irrelevant in contemporary discourse especially because of its political underpinnings in that it may be seen as submitting to terrorist demands. To understand, however, this attitude, one must examine the prevailing political circumstances at the time; the eastern bloc maintained that its social system provided such harmony that precluded recourse to political violence; the Group of Arab states and the developing world insisted that Israel and South Africa repressed the legitimate struggle of peoples to self-determination, thus provoking violence; the western bloc was isolated and rejected the dichotomy of acceptable violence as a remedy towards social, political or ethnic injustices. Resolution 3034, therefore, did not echo western views. In fact, while condemning terrorism in its preamble, it went on to reaffirm the right of self-determination and describe as 'terrorist' all acts perpetrated by colonial, racist and alien regimes[36]. There is no doubt that Resolution 3034 was hardly aimed at deterring the perpetrators of terrorist violence as much as defending violence against specific countries, although operative paragraph 5 invites States to become parties to then existing anti-terrorism conventions. At

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[35] G.A. Res. 3034 (XXVII) (18 Dec. 1972).

[36] Operative paras. 3 and 4.

that session the Assembly decided to establish an Ad Hoc Committee on International Terrorism, consisting of 35 members, which met in 1973, 1977 and 1979 and reported to the General Assembly at its twenty-eighth, thirty-second and thirty-fourth sessions. Although the item has remained on the Assembly's agenda ever since 1972, the long name with the strong reference to underlying causes has not survived, since the last resolution that bore it was one adopted at the very end of the Cold War[37]. As will become apparent in my analysis, Assembly resolution 46/51, adopted on 9 December 1991, not only shortened the name to 'Measures to Eliminate International Terrorism', but also was the precursor to further changes in the attitude of the Assembly, although the right to use violence in pursuit of self-determination was a major component of that resolution[38].

Between 1972 and 1991 the Assembly focused its attention on addressing these underlying causes of terrorism on the basis of a Report prepared by the Ad Hoc Committee, presented to the Assembly at its 34th session[39]. However, subsequent resolutions introduced new concepts, such as 'State-sponsored' terrorism[40] and international co-operation taking specific forms (e.g. bilateral extradition treaties or similar clauses, exchange of information, etc)[41]. The former concept was used both in the contemporary sense, i.e. directly or indirectly assisting the perpetration of terrorist acts, but also as a weapon of political persuasion, primarily against the USA. Thus, Assembly resolution 39/159, entitled 'Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States', demanded that States refrain from military

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[37] G.A. Res. 44/29 (4 Dec. 1989).

[38] Operative paras. 6 and 15.

[39] In 1985 Syria requested placing an item on the agenda regarding the differentiation of terrorism from the right to self-determination, UN Doc. A/42/193 (1985). This proposal was supported by the Group of Arab States, UN Doc. A/42/193/Add. 1-3 (1985). See UN Doc. A/42/832 (3 Dec. 1987).

[40] G.A. Res. 34/145 (17 Dec. 1979), operative para. 7. This terminology was not used in the resolution. See also G.A. Res. 38/130 (19 Dec. 1983), operative para. 4; 40/61 (9 Dec. 1985), operative para. 6.

[41] Id, operative para. 11.

intervention aimed at overthrowing another government for socio-political reasons[42]. Resolution 42/159 further called for the adoption of a generally agreed definition of terrorism[43], which was opposed by western States, especially since relevant resolutions distinguished between acceptable and non-acceptable forms of terrorist violence.

In the period between 1989 and 1994 one may discern a distinct change in the Assembly's approach to politico-legal questions and their terminology. Resolution 44/29 underlines the close links between terrorism and drug trafficking, stressing that such types of violence 'endang[er] the constitutional order of States and violat[e] human rights'[44]. This is a striking and radical statement for two reasons: firstly, the linkage to organised crime may well encompass most terrorist and national liberation groups as they seek to fund their struggles. Thus, the vociferous call in the past for examining underlying causes could become inapplicable if elements of organised crime – or arbitrary assimilations thereto - becomes an unacceptable element in the international legal discourse[45]. Secondly, the reference to human rights and their violation by terrorist/organised criminal groups is clearly alien to the theoretical and legal discourse on human rights, which advocates that only States can violate human rights, whereas non-State actors are only capable of committing criminal acts. This shifting of liability and the use of terminology was not accidental, but rather the result of the collapse of State support (both material and ideological) of political or ideological groups. The change, however, was subtle. As previously examined resolution 46/51, adopted in 1991, shortened its title, but recalled all previous resolutions, starting with 3034 of 1972. Similarly, it retained its support for all self-determination struggles, while

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[42] G.A. Res. 39/159 (17 Dec. 1984)

[43] G.A. Res. 42/159 (7 Dec. 1987).

[44] G.A. Res. 44/29 (4 Dec. 1989), operative para. 9.

[45] See: Mylonaki, E., The manipulation of organised crime by terrorists: legal and factual perspectives, 2 *International Criminal Law Review* (2002), p. 213.

also reiterating the reference to human rights violation by non-State entities and the links to organised crime that were introduced by its predecessor, resolution 44/29.

In 1993 a new item was placed on the Assembly's agenda, entitled 'Human rights and terrorism'[46]. The first resolution, 48/122, used conflicting terminology. On the one hand, in its preamble, it indirectly made the proposition that terrorism threatens the right to life as well as violates human rights, but in its opening operative paragraph emphasised that terrorist activities lead to the 'destruction' of human rights and democracy. Similarly the UN Commission on Human Rights frequently described terrorism as aimed at the destruction of democracy[47], or the destabilizing of 'legitimately constituted Governments' and 'pluralistic civil society[48]'.

The use of the term democracy was perhaps aimed at differentiating between the obligations of States in not 'violating' human rights, while at the same time introducing a new set of obligations incumbent on non-State actors. This unfortunate state of affairs has persisted[49] and the term 'destruction' now denotes the responsibility of terrorist/organised crime groups for what is otherwise the sole responsibility of State actors[50]. Nonetheless, it should be noted that a large number of States has abstained from voting in these resolutions, including France, Germany, the USA and the UK[51].

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[46] G.A. Res. 48/122 (20 Dec. 1993). In later years the Human Rights Commission appointed a Special Rapporteur to examine this question in more detail.

[47] UNGA Res.48/122 (1993), 49/60 (1994), 49/185 (1994), 50/186 (1995), 52/133 (1997), 54/164 (2000), 2-3; UNComHR Res 1995/43, 1996/47, 1-2; 1997/42, 1-2; 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37, UN SubComHR Res. 1994/18, 1996/20, 1997/39, 2001/18, 2002/24, 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), .

48 UNGA Res. 48/122 (1993), 49/185 (1994), 50/186 (1995), 52/133 (1997), 54/164 (2000), 2-3; UNComHR Res. 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37, UNSubComHR Res. 1994/18, 1996/20.

[49] See: G.A. Res. 49/185 (23 Dec. 1994); Res. 50/186 (22 Dec. 1995)

[50] See: Bantekas, I., et al, *International criminal law*, (Cavendish Publication, 2002), p.p. 46-47.

[51] See: G.A. Res. 52/133 (12 Dec. 1997), with 57 States abstaining.

Resolution 49/60 did much more than produces the seminal Declaration on Measures to Eliminate International Terrorism[52]. The preamble contained no reference to the series of resolutions linked to 3034, except for its immediately proceeding resolution, 46/51 of 1991. The fact that resolution 49/60 is, moreover, silent regarding the underlying or root causes of terrorism is certainly evidence of the fact that the Assembly moved away from such argumentation and that its legal discourse and semantics had radically altered. The focus is now on enhancing international co-operation[53] and the elimination of the links between terrorism and organised crime. Significantly, the Declaration provided the only single extant definition of terrorism, as follows:

'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes, [irrespective of the considerations invoked to justify them, whether they be] political, philosophical, ideological, racial, ethnic, religious, or [of] any other nature'[54].

The collapse of traditional alliances after the Cold War, the gradual abandonment of State-sponsored terrorism and the relative success of the Security Council in the Gulf War, was recognized by the Assembly. Resolution 50/53 underlined the role of the Council where terrorism was a threat to international peace and security[55]. It was at this time that the Council had taken action against Libya and Sudan regarding those countries' involvement in terrorism. All the aforementioned resolutions exclude any possible justification for the act and demonstrate the paradigmatic shift of the opinion of states.

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[52] G.A. 49/60 (9 Dec. 1994), Annex.

[53] The Secretary-General was entrusted with the task of collecting data on the status and implementation of all relevant agreements, making a compendium of national laws and instruments, and providing an analytical review of international legal instruments, as well as review possibilities for assisting states in combating terrorism. Id, Annex III, para. 10.

[54] Id, Annex I, para. 3. This was reiterated in all future resolutions, such as G.A. Res. 50/53 (11 Dec. 1995).

[55] G.A. Res. 50/53 (11 Dec. 1995), para. 7.

In 1996, the Assembly established one of its most successful organs, the *Ad Hoc* Committee, on the basis of resolution 51/210, with the aim of developing the international legal armoury against nuclear terrorism and terrorist bombings[56]. The *Ad Hoc* Committee has since elaborated the Terrorist Bombings and Terrorist Financing conventions and with its mandate having been renewed annually by the Assembly[57], it is currently focusing its attention on elaborating two other elusive agreements; one on nuclear terrorism and a comprehensive convention on terrorism[58]. Whereas the main disagreement regarding the nuclear terrorist treaty regards its scope and the inclusion or not of the military within its ambit[59], the comprehensive convention lacks consensus on a common definition and is problematic in respect of the following: a) its relationship to other sectoral conventions, primarily to ensure legal certainty in the application and interpretation of both the comprehensive and sectoral conventions, and; b) the differentiation between self-determination struggles and terrorism[60]. It should be noted that at present and throughout the Assembly's examination of terrorism, it was supported by specialized agencies, especially the International Atomic Energy Agency (IAEA), the International Civil Aviation Organisation (ICAO) and the International Maritime Organisation (IMO).

It is apparent that while the Assembly was indeed making an effort to formulate a counter-terrorism model from the early 1970's to the early 1990's, the lack of consensus precluded any agreement. Competing national and political interests and the absence of a common security threat certainly underpinned this lack of consensus. One side was pulling towards the most purest form of a preventive approach (i.e. root causes), while the other was a reactionist approach against all forms of ideological

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[56] G.A. Res. 51/210 (17 Dec. 1996), para. 9.

[57] Under the terms of G.A. Res. 55/158 (12 Dec. 2000), it was decided that the Ad Hoc Committee continue its mandate, at least during the fifty-sixth session, within the framework of a Working Group of the Sixth Committee.

[58] For the text of the draft comprehensive convention, see: Report of the Ad Hoc Committee, Sixth sess. (28 Jan. – 1 Feb. 2002), UNGAOR 57th sess., UN Doc. A/57/37/Supp. No. 37 (2002).

[59] Report of the Working Group, UN Doc. A/C.6/57/L.9 (16 Oct. 2002).

[60] Report of the Ad Hoc Committee, Fifth sess. (12-23 Feb. 2001), UNGAOR 56th session, UN Doc. A/56/37/Supp. No. 37, Annex V, pp. 12-14.

violence. Although it is very difficult to expect the Assembly to come up with an approach acceptable to all, its usefulness for our purposes lies in the fact that it is the benchmark of recognizable State practice. As such, we are able to assess what is generally unacceptable and what is the lowest common denominator acceptable to the majority of States. For the Assembly, this common denominator seems to encompass a model based on inter-State cooperation, albeit mostly premised on suppression rather than prevention.

Following the events of September the 11, a major question that arose within the international community is the efficiency of the existing anti-terrorism legal regime. The existing anti-terrorism conventions have been proven to be less effective than expected. Partly the reason has been their focus on sub-forms of terrorism, rather than the phenomenon as such thus failing to cover its more modern manifestations. At the same time the political offence exception contained in the treaties meant that the enforcement of the instruments depends on the willingness of states to support the international co-operation in criminal matters.

3. THE THEMATIC APPROACH AS THE ONLY VIABLE MODEL?

It is easy to detect why the thematic formula was accepted and implemented as the only viable counter-terrorist approach; precisely because to achieve consensus on a comprehensive convention would be impossible. The thematic approach was in all practical sense the only possible vehicle and in light of the fact that ideological violence until the early 1990's did not reflect the fundamentalism of our era, the need for a comprehensive convention then was not as pressing as it is now.

Such ideological divisions have hampered further efforts to draft a treaty dealing with international terrorism. As a consequence of these differences, the most effective way of the international community to proceed has been the consideration of specific aspects of the subject. Thus, binding instruments have been adopted dealing with specific manifestation of the phenomenon. The rigidity that has characterised discussions since the early part of the twentieth century, as well as the absoluteness of national positions on terrorism – premised no doubt on national interests – has been

responsible for the so-called 'thematic' approach in international legal discourse. This essentially means that in the absence of a single binding international definition, the subject matter is necessarily severed from the whole and reconstructed using its various facets as distinct sub-units.

4. EVIDENCE OF A MORE EFFECTIVE SUPPRESSIONIST MODEL

4.1 TERRORIST BOMBING CONVENTION

As already indicated in 1996, the Assembly established the *Ad Hoc* Committee, on the basis of resolution 51/210, with the aim of developing the international legal armoury against nuclear terrorism and terrorist bombings[61]. The *Ad Hoc* Committee has since elaborated the Terrorist Bombings and Terrorist Financing conventions and with its mandate having been renewed annually by the Assembly[62], it is currently focusing its attention on elaborating two other elusive agreements; one on nuclear terrorism[63] and a comprehensive convention on terrorism[64]. Particular dimensions of ideological violence such as terrorist bombings, terrorist financing[65], traffic in arms, exchange of

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[61] G.A. Res. 51/210 (17 Dec. 1996), para. 9.

[62] Under the terms of G.A. Res. 55/158 (12 Dec. 2000), it was decided that the Ad Hoc Committee continue its mandate, at least during the fifty-sixth session, within the framework of a Working Group of the Sixth Committee.

[63] UN Doc A/C6/53/l4, Annex I , 1998, Draft Article 4.

[64] For the text of the draft comprehensive convention, see Report of the Ad Hoc Committee, Sixth sess. (28 Jan. – 1 Feb. 2002), UNGAOR 57th sess., UN Doc. A/57/37/Supp. No. 37 (2002).

[65] It should be noted that the financing of terrorism has been the subject of concern for a number of international bodies that have a regional focus and that are concerned with economic development and the financial sector. For example see: Pacific Island Forum Press Statement of 28/2/03. See also: European Banking Federation, Recommendations for Drafting, Interpreting and Implementing Financial Sanctions (5 July 2002), available at: http://212.3.246.149/1/GLPHGNLANDAGJBLNNOFPEBKPYDSHAPH749V6476CMHYC4TBQV6U69YBDG3BYWYA3BY9LTE4Q/EBF/docs/DLS/recommendations_for_drafting-2004-02113-01-E.pdf.

information concerning persons or organisations suspected of terrorist-linked activities, disruption of global communications networks and technical co-operation in training for counter-terrorism, were subjects not covered by the twelve existing conventions on international terrorism. As these are now matters of crucial concern, the adoption of the recent anti-terrorism conventions express the determination of the international community of states to spread a campaign to shut off the potential taps that feed terrorism worldwide and this is no more apparent in its efforts to counter terrorist financing through inter-State cooperation in the fields of government, banking and other financial sectors[66]. The terrorist bombing convention and the financing of terrorism convention both are inter-state in character, they adopt a much less-consensus based approach that it's other inter-state counterpart. One of the innovative[67] elements of the Conventions is that they treat the offences prescribed therein as a non-political offence for the purpose of extradition. The legal effect of this provision is that a normal defence that would be available to a fugitive offender to plead that an act was committed under political motivation is denied in the case of extradition proceedings relating to a terrorist bombing. The provision recognises that where there is recourse to indiscriminate violence against civilians, then the offender is not entitled to the protection provided by the laws governing extradition. We can therefore detect that the main theme underlying the Convention is the abandonment of particular safeguards otherwise granted to the accused under domestic law and prior anti-terrorist conventions.

When the Bombing Convention was adopted in early 1998 international law-makers had not yet witnessed the devastating effects of the US Embassy bombings of Tanzania and Kenya, or the 9/11 attacks, nor the later bombing sprees in Indonesia, Morocco and Spain – between 2002-03. Other

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[66] After the events of September 11, the US authorities examined how a terrorist operation is financed. See relatively: Lormel, D., *Congressional Statement before the House Committee on Financial Services*, Subcommittee on Oversight and Investigations, (12 February 2002), available at: http://www.fbi.gov/congress/congress02/lormel021202.htm.

[67] This is the first case that the political offence exception was excluded in a convention negotiated in the United Nations.

sporadic incidents, however, and particularly the failed attempt to destroy the World Trade Centre in 1993 had given some insights to security specialists of what was to follow. Otherwise, the adoption of the 1998 Convention is questionable from a political perspective, since as most incidents were of domestic origin and effect, many countries did not wish to make applicable the international laws of armed conflict to bombing incidents perpetrated by separatist or other national liberation movements, with a view to depriving them of any claims to self-determination. This was the UK's position throughout the IRA campaign, where transnational elements were recognised only where UK secret agents were involved in clandestine operations to thwart bombing operations originating abroad[68], or where extradition proceedings were concerned. This policy perspective also helps explain why the Convention was poorly ratified up until the events of 9/11.

The second paragraph of the 1998 Bombing Convention recognizes that terrorist bombings are inconsistent with State security, jeopardizing moreover friendly relations among States, while the ninth paragraph establishes that terrorism is a grave offence of concern to the international community and that all accused persons, in accordance with the provisions of the Convention, should be either extradited or prosecuted. It is clear, in conjunction also with Article 3 of the Convention, that the self-determination concerns of many States have been alleviated, by narrowing the operational ambit of the Convention to encompass only terrorist bombing incidents that have an international element. It is evident that the strong inter-State cooperation mechanisms provided in the Terrorist Bombings Convention will enhance the aims of the Convention over other international norms that are in parallel existence.

Article 6 of the 1998 Bombing Convention allows member States to assume wide-ranging extraterritorial jurisdiction. This includes application of the principles of territorial, passive personality,

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[68] McCann v. UK (1996), 21 *EHRR* 97.

active personality[69] and protective principles of jurisdiction, while moreover States are permitted to employ any other jurisdictional basis in conformity with their domestic law[70]. There is no provision in the Convention that would affirm the existence of universal jurisdiction, save for the *aut dedere aut judicare* (either prosecute or extradite principle)[71], stipulated in Article 6(4). However, there is no general agreement in academic writings to the effect that this principle entails the application of universal jurisdiction[72]. From a practical point of view, universality of jurisdiction may be premised on the fact that Article 6(5) does not exclude any form of jurisdiction employed under domestic law – if there is a conflict with another State this has to be resolved – and thus a Statute asserting universal jurisdiction over terrorist bombings without a link to the forum is acceptable. However, the treaty is more likely to seek to provide wide alternative bases of jurisdiction, but does not establish universal jurisdiction. It is not really jurisdiction *stricto sensu,* because in any given case only contracting states would be able to exercise jurisdiction, whereas universal jurisdiction allows any state to assert jurisdiction over the offence.

During the drafting of the 1998 Convention it was deemed important that if an accused fled to a State other than one endowed with primary jurisdiction, that State would have jurisdiction to prosecute the accused[73]. The proposal was therefore that the Convention should declare that terrorist bombing was an international offence, so that any State in which an offender was found would possess jurisdiction. It

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[69] Habitual residence is also prescribed. In its Advisory Opinion in the Acquisition of Polish Nationality case, the PCIJ stated that 'habitual residence' is the establishment of residence 'in a permanent manner with the intention of remaining' in the State. See: *PCIJ* [1923], Series B, Advisory Opinion 7, p. 20.

[70] Art. 6(5).

[71] See: Bassiouni, C. M., Wise, E. M., *Aut Dedere Aut Judicare: The duty to extradite or prosecute in international law*, (Martinus Nijhoff, 1995).

[72] For a negative view, see: Bantekas, I., Nash, S., *International criminal law*, (Cavendish 2002), p. p. 156-60; for the view that the various terrorist offences are subject to universal jurisdiction, see: USA v Yunis (No.3), 924 F. 2d 1086 (1991), and Principle 2(1) of the 2001 Princeton Principles on Universal Jurisdiction, available at: http://www1.umn.edu/humanrts/instree/princeton.html

[73] Report of the Ad Hoc Committee, UN Doc. A/52/37 (1997).

was recognised, however, that piracy, for example, became an international offence under customary law only after a maturity of a few centuries. It was doubted that the same result could be brought about by simply making a declaration of this kind in a legal instrument. It is possible that States which establish universal jurisdiction over offences contained in the Terrorist Bombings Convention will actually exercise such jurisdiction with respect to an offender who is a national of a non-party to this Convention. If the non-party complains, the question would thus arise as to the effect this provision might have upon the rights of States, which are not parties to the Convention. As will be discussed later in the thesis, this matter may for all practical purposes be moot, since Security Council 1373 and its application by the Council to cases of internal terrorist bombings has removed the problem of unwilling non-State parties.

Articles 10 and 15 of the 1998 Terrorist Bombings Convention speak in binding language about the obligations owed at the inter-State level, despite the fact that many of the obligations contained therein require only domestic action. Article 10(1) is instructive:

'States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings'.

Since the 1998 Convention encompasses terrorist bombings with an international element, it is crucial that the sharing of information and other intelligence across national frontiers is paramount in preventing and punishing offenders. The mechanisms by which such co-operation may be facilitated are twofold: a) existing mutual legal assistance treaties, whether bilateral or multilateral[74], and; b) through the creation of a new mechanism, supplementary to the existing structures, as described in

[74] Art. 10(2), Terrorist Bombings Convention.

Article 15 of the Convention. States Parties shall cooperate in the prevention of the offences set forth in Article 2, particularly:

(a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the perpetration of offences as set forth in Article 2;

(b) By exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences as set forth in Article 2;

(c) Where appropriate, through research and development regarding methods of detection of explosives and other harmful substances that can cause death or bodily injury, consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, exchange of information on preventive measures, co-operation and transfer of technology, equipment and related materials.

Obviously the facilitation of co-operation is based on an inter-state co-operation model. Further evidence of this model is the obligation to criminalize the offence at the domestic level, in accordance with Article 4 of the Terrorist Bombings Convention[75]. The Convention further obliges States to render this an aggravating offence[76] and as such deny the perpetrators any ideological justification[77]. This is the first of many provisions in the Convention, which impose obligations upon States parties regarding

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[75] This provision corresponds with Art. 2 of the Hostages Convention, Art. 2 of the Hague Convention, Art. 3 of the Montreal convention.

[76] Art. 4(b), Terrorist Bombings Convention.

[77] Art. 5, ibid.

the suppression and punishment of the offence of terrorist bombing. It can be seen thus, that the enforcement of the prohibition relies on a balance of municipal action – legal and enforcement – as well as on inter-State co-operation.

4.2. THE FINANCING OF TERRORISM CONVENTION AS EVIDENCE OF LESS CONTEXT SPECIFIC INTER-STATE MODEL

At the global level one of the cornerstones of the struggle against terrorism was the international convention for the suppression of the financing of terrorism. This convention cannot be put in the same category as all the other UN, because it does not deal with specific manifestations of terrorism. In December 1999 the UN General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism[78] after negotiations that commenced in 1996[79] and which, unlike previous anti-terrorist conventions, does not focus on any one particular manifestation of terrorism (hijacking, bombing etc.), but is instead aimed at those individuals that:

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[78] 39 *ILM* (2000), 270; see: Morris, V., Pronto, A., The work of the sixth Committee at the fifty-fourth session of the UN General Assembly, 94 *AJIL* (2000), p.582; see also: EC Council Recommendation of 9 Dec. 1999 on Co-operation in Combating the Financing of Terrorist Groups (O.J. C 373, 23/121999).

[79] The Convention was adopted following a French proposal. See: Working Document Submitted by France on the Draft International Convention for the Suppression of Financing of Terrorism, UN *GAOR*, 54th sess., Supp. No.37, UN Doc. A/54/37, Annex II (1999), p.14.

'By any means, directly or indirectly, unlawfully and wilfully, [provide] or [collect] funds with the intention that they should be used to commit terrorist acts[80].'

While notionally covered by the accomplice liability provisions of the various existing 'sectoral' anti-terrorism treaties, the issue of the material support provided by these networks was considered to be of such importance in the fight against terrorism that it warranted its own treaty. The treaty, which was in part modelled on the Terrorist Bombings Convention, includes the now 'standard' anti-terrorism provisions, but also contains new provisions specific to the financing of terrorism with a view to providing States with the capability to counter these vast networks which commonly cross two or more international boundaries. For example, provision is made for the possibility of the criminal liability of legal persons[81], as well as for the freezing and seizure of funds[82] and the prohibition of reliance on bank secrecy laws as a ground for declining mutual legal assistance[83].

The said Convention is particularly welcome as it recognises that the financing of terrorism is a matter of grave concern to the international community and requires States to adopt regulatory measures, and is the only internationally significant anti-terrorist initiative focusing specifically on the financing of terrorism to pre-date the 9/11 events. The offence created by the Convention is that of providing or collecting funds that are to be used to carry out terrorism. Article 2 defines an act as constituting a specific terrorist offence if it either constitutes a specific offence within the scope of one of the nine UN Conventions listed in the treaty annex that addresses various types of terrorism, or any other act intended to cause death or serious bodily injury to a civilian or to any other person not taking part in

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[80] Art. 2(1). It is also an offence to participate, organise or direct, act in a common purpose (Art.2 (5), or attempt (Art. 2(4) any of the offences describe in Art. 2(1). See also: Report of the Ad Hoc Committee established by GA Res. 51/210 (1996), UN GAOR 54th Session, UN Doc. A/54/37/Supp. No.37 (5 May 1999), p.3.

[81] Art. 5.

[82] Art. 8.

[83] Art. 12.

hostilities involving armed conflict, when the purpose of such act was to intimidate a population or to compel a government or international organisation to do or refrain from doing an act.

Furthermore, Article 8 of the Convention requires every signatory State to take appropriate measures, in accordance with national laws, for the detention and freezing of any funds allocated for terrorist offences[84]. Article 11 requires States to render the offences prescribed in the Convention extraditable and to assume jurisdiction over such offences by making them punishable with appropriate penalties[85]. Moreover, the 1999 convention removes the political offence exception by obliging contracting states to ensure that criminal acts within its scope are under no circumstances justifiable by considering of a political, ideological, racial, ethnic, religious or other nature[86]. The Convention entered into force on 10 April 2002 after the required 21 States – out of the 129 signatories - had deposited their instruments of ratification with the United Nations. It should be stressed that although only a few countries, such as the UK, ratified the Terrorist Financing Convention prior to 9/11, the vast majority of States expressed no desire to do so. The UK adopted secondary legislation to implement the Convention that prohibits any person from making '*any funds or financial services available directly or indirectly to or for the benefit of a listed terrorist or organisation controlled by terrorists*[87]. Although at the time of writing in late 2006 about 130 States had ratified the Convention, this has come as a result of the obligations imposed by Security Council Resolution 1373 and diplomatic pressure from the USA. Ironically, the USA was not itself prepared to ratify the 1999 Convention and it was only after the events of 9/11 that it spearheaded a campaign to enshrine terrorist financing within an internationally binding legal framework. The principal reason behind the inhibition of States to ratify the Convention is obviously

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[84] The UK Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 provide for a comprehensive statutory scheme to deal with terrorist property. More specifically, sections 15(3), 15(4), 17(a), 17(b).

[85] See sec. 63 of the UK Terrorism Act 2000.

[86] Article 6.

[87] See: SI No 3365 (Mar.2001). UK law imposes further restrictions on terrorist financing in the Anti-terrorism Crime and Security Act 2001, amending the Terrorism Act 2000.

the possibility that private financial systems will be scrutinised by international bodies and sensitive information would have to be divulged to foreign investigative bodies. Such lack of trust and adherence to the unilateral internal approach did not survive long. The parallel existence of an inter-State suppressionist model through the adoption of the 1999 Convention failed to subdue the unilateral internal model – through which States dealt with terrorist financing through control of their own financial systems. However, as it will become clear in the last chapter, even those countries that were holding dearly to the unilateral model, principally the USA[88], became the strongest advocates in favour of a hybrid centralised Security Council model that goes far beyond in terms of imposing domestic obligations than the 1999 Convention could go.

By closing this section related to the development of particular counter-terrorism models, I can conclude that despite their diversity, the said conventions share common – although different - modalities of international co-operation, namely: extradition, mutual legal assistance and transfer of criminal proceedings. The implementation procedures of the criminal law enforcement model are discussed below.

5. IMPLEMENTING ENFORCEMENT PROCEDURES

As has already been mentioned, the international aspects of terrorism infringe upon the interests of many States, thus bringing their criminal jurisdictional ambit into operation. For instance, the terrorist who has perpetrated a wrongful act in one State can seek refuge in another State and likewise the

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[88] In 2002 the USA enacted the Suppression of the Financing of Terrorism Convention Implementation Act, 18 USC § 2339C(a)(1), which implements the requirements of the 1999 Convention.

question of extradition is posed. International co-operation in matters of extradition and mutual assistance between states aims at arresting and transferring suspects, freezing assets and securing evidence. Thus, all co-operation is materialised following the criminal events, is thus based on a suppressive model.

Extradition is a vital ingredient in opposing terrorism and thus the majority of international treaties include special provisions on extradition. Extradition is the legal process whereby a fugitive offender, under treaty or upon the basis of reciprocity, is surrendered to the State in which an offence was allegedly committed in order to stand trial or serve a sentence of imprisonment. It is a process that aims to further international co-operation in criminal justice matters and is based primarily on the assumption that the requesting State is acting in good faith and that the fugitive will receive a fair trial. The law and practice of extradition derives from a desire of States not to allow serious crimes to go unpunished, as well as on the belief that the State on whose territory the offence has been committed is the most able to try the offence because of the availability of evidence.

Most countries of the world today are bound to one another through extradition treaties that seek to balance the rights of the individual with the need to ensure that the extradition process operates effectively[89]. The majority of these are based on the following internationally recognized principles: the requirement that the offence is an extraditable one (linked to the principle of double criminality)[90], the rule of speciality, double jeopardy[91], and the political offence exception[92]. Since the practice of extradition is primarily premised on bilateralism, there does not exist an international corpus of norms that could be called international law of extradition. The USA continues to prefer bilateral treaties as

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[89] Extradition as a tool in combating terrorism is further discussed in chapter four of the present thesis.

[90] UK Extradition Act 2003.

[91] *Ne bis in idem*. For a broad application of the principle see: article 9 of the European Convention on Extradition, 13 December 1957, *ETS* NO. 24

[92] See: Bantekas, I., supra note 72, p. p. 181-84.

the legal basis for extradition[93], while European countries depend mostly upon multilateral regional treaties in their mutual dealings and bilateral extradition treaties in their dealings with non-European States. Likewise, international co-operation in criminal justice matters depends upon a network of bilateral and multilateral treaties, which very often establish different and conflicting interests. Furthermore, a number of existing extradition treaties are outdated and this can affect their effectiveness and general impact[94]. However, the question whether States are obliged to follow extradition proceedings or whether international law establishes a moral or legal obligation[95] still remains unanswered. A problem regarding extradition for criminal offences where there is not an extradition treaty between states is illustrated by the Lockerbie case.

Extradition arrangements between States in close geographical proximity, which often share a common legal and cultural heritage, present generally no major difficulties. On the other hand, extradition between States that are culturally, politically and legally distant from each other poses serious problems for the achievement of an approach outside the bilateral formula. The approximation of criminal laws and policy in the EU for example facilitates the multilateral regional approach because the crime is defined in more or less the same terms, the same is true for the procedural guarantees and the mechanism itself can be checked by reliable and trustworthy institutions. Where such legal and institutional uniformity is missing, thus diminishing the existence of good faith, extradition is only possible on the basis of the bilateral approach and there is little in the horizon suggesting a radical transformation of legal and political cultures around the world, such that would accommodate shift towards a multilateral approach. However, the modern treaties generally exclude the political offence

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[93] For example: UK –USA Extradition Treaty, signed on 31 March 2003. For the full document see: www. Statewatch.org/news/2003/Jul/UK_US_extradition.pdf.

[94] See generally: Vamvoukos, A., *Termination of treaties*, (Oxford University Press, 1985), p.p. 212-221.

[95] For information on the UK responses to extradition requests, see: Bantekas, et al, supra note 72, at chapter 8. It should be noted that South American States have traditionally adopted the view that extradition is a legal obligation even in the absence of a relevant treaty. See Re Alvez Novo, 19 *ILR* 361 (1952), Re Bachnofer, 28 *ILR* 315 1963, Re Milton Gomes, AD, Case No.177 (1929-1930).

exception and indeed the Security Council in resolution 1373 insisted that states ensure that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorist.

Similarly to extradition, the mutual assistance treaties are signed on a bilateral or multilateral basis[96] which provide details of the procedure for the exchange of evidence and examples of the grounds on which requests can be refused. However, several mutual assistance agreements specifically exclude co-operation where the requested state has substantial grounds for believing that the request for mutual assistance has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that persons position may be prejudiced for any of these reasons. Some also suggest that other human rights concerns may provide a basis for refusal to co-operate[97].

The common denominator of all these forms of co-operation adopted by states is that they rely to a large degree on domestic law and remedies to achieve the overall purpose of the conventions. Thus, it is domestic law, domestic courts and domestic prosecutorial authorities that are incumbent with matters of legislative, judicial and enforcement jurisdiction respectively. These instruments, therefore, do not attempt directly to create individual liability under international law for the specific offences. It is worth noting that these instruments do not describe offences that are novel, as all States can be assumed to have pre-existing laws that prohibit acts such as hostage–taking or assaults on diplomats. But it is not adequate for the suppression of international terrorism that States possess pre-existing legislation against the described conduct. The real value of the anti-terrorist instruments is that they

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[96] See: Council of Europe Convention on Mutual Assistance in Criminal Matters, Strasbourg 20 April 1959, ets no. 3. Also: Convention on Mutual Assistance in Criminal Matters between the member states of the European Union, adopted on 29 May 2000. For both see: Justice, EU cooperation in criminal matters: a human rights agendas, August 2002.

[97] See Article 8 of the European Convention on the Suppresssion of Terrorism.

require State parties to actually deal with the terrorist offender and not merely a common criminal and they establish generally an international framework for co-operation in the suppression of such acts. Despite the reliance on municipal law, the enforcement of rules regarding the described offences is not longer a domestic matter, as States parties have now incurred an international obligation with respect to terrorist violence, There are benefits and drawbacks to a paradigmatic shift of this nature. On the one hand, the State is able to receive intelligence about terrorist activities from around the world, as well as secure the presence of the accused through its co-operation with the enforcement authorities of other States. The obvious drawback for States is the sharing of national security information, although in the long run this can only yield positive effects for national security. The fact that the international community chose to adopt the inter-state suppressionist model attests to the inadequacy of the unilateral model and the widely shared perception of more benefits rather than many drawbacks.

An examination of attempts to regulate terrorist behaviour through international specific treaties reveals that there was little hope of nations effectively coming to grips with the problem as a collectivity. There are two obvious reasons why this should be so. The first reason is that there is little chance that nations will agree on what constitutes legitimate struggle for self-determination. The second reason is that States appear reluctant to give up their right to grant asylum to those who commit politically motivated offences. This necessarily means that all the forms of co-operation existing in the relevant conventions will be subject to such limitations, because these limitations are also implicit in the conventions by the very fact that the forms of co-operation stipulated therein are not autonomous (e.g. the *aut dedere* principle is dependent on the existence of an extradition treaty between the requesting and requested States).

All the anti-terrorism treaties dealing with specific manifestations of terrorism from attacks against internationally protected persons to terrorist bombing and terrorism financing contain their own definitions of the acts covered by them and oblige state parties to criminalize the conduct in domestic law. However, those treaties are directed towards imposing obligations on state parties, not on establishing criminal responsibility of individuals. Unless the state parties implement the treaty it is questionable whether individuals could be prosecuted on the sole basis of treaty law. Obviously in case of domestic implementation of the treaty no problem arises. In case international law is transformed into national law through the various mechanisms for the national implementation of international

rules, then it becomes binding on individuals[98]. National implementation of international rules becomes thus a matter of crucial importance. Indeed after September 11, many states passed domestic laws to incorporate treaty law. Moreover, Resolution 1373 of the Security Council called on all states to increase co-operation and fully implement the relevant international conventions and protocols related to terrorism and to ensure that terrorist acts are established as serious criminal offences in domestic laws[99].

6. THE INTERNATIONAL CRIMINALIZATION OF TERRORISM?

Legal counter-terrorism measures operate on both domestic and international levels. However, to engage the United Nations terrorism must have a significant international dimension. Terrorism is frequently international in character. It is international when it crosses borders (Kashmir), by the nationality of the participants or the victims as in (New York) or by targets (Bali). The fact that terrorism nowadays has acquired an international dimension does not necessary imply that all terrorist activity amount to international crimes. A group which engage in terrorist activity carried out within a state is liable under the criminal law of the relevant state[100]. The fact that other states may be bound by treaty obligations to co-operative in searching for and punishing the perpetrators, that in itself does not render a domestic terrorist act an international offence[101]. The US military tribunal at Nuremberg defined an international crime as '*an act which the international community recognises as not only as a violation of state criminal law but one which is so serious that it must be regarded as a matter for*

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[98] On the issue of implementation see: Cassesse, A., *International law*, (Oxford University Press, 2001), p.p. 162-168.

[99] Duffy, H., *The war on terror and the framework of international law*, (Cambridge University Press, 2006), p. 9.

[100] Supra note 97, p. 128.

[101] Ibid.

international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances'[102].

Likewise an offence becomes international when existing treaties or custom consider the act as being an international crime and entail individual criminal responsibility for the perpetrator of the act. There is however, some inconsistency in the way international treaties define or prescribe offences where they purport to so criminalize specific conduct. The first category comprises those treaties such as the 1948 Convention of the Prevention and Punishment of the Crime of Genocide[103], which contain a categorical provision that the forbidden act constitutes a crime under international law[104]. A second category of treaties dealing with crimes of international relevance may or may not describe the forbidden conduct as crime but impose a duty on contracting parties to prosecute or extradite the alleged offender or simply render the said conduct an offence under their national laws, without establishing individual criminal liability for the perpetrator of the act. As it became evident from previous sections the existing anti-terrorism treaties create state responsibility for parties to the treaties but they do not themselves provide the basis for criminal prosecution of the perpetrator of the act[105]. Thus, they are dealing with crimes of international relevance rather than with crimes under international law. Although the majority of international anti-terrorism treaties require that each crime have an international or transnational element, which is based on the magnitude of the conduct, the heinous nature of the act is not the sole determination for elevating such behaviour to the status of an international offence[106]. Absent an internationally accepted definition of terrorism, the international community has required signatory states to criminalize certain acts of terrorism by enacting domestic

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[102]See: Hostages Trial, US Military Tribunal at Nuremberg, 19 February 1948, 1953, 15 *Ann. Dig.* 632, para. 636.

[103]1948 Convention against Genocide, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment

[104] Supra note 99.

[105] See relatively: supra note 98, p. 90.

[106] Supra note 72, p. 4.

legislation. This approach to counter-terrorism makes the definitions of terrorism in domestic counter-terrorism legislation crucial to the effectiveness of international law's response. However, since the September 11 there was a paradigmatic shift as there are indications that such an approach of using international law to declare that certain acts should be criminalized in the domestic law of each signatory state should alter. And that terrorist acts should be illegal at international law. Whether this will be given serious consideration is unclear at present.

PART THREE

1. CONTEMPORARY THREATS[107] AND THE 'WAR ON TERROR': LEGAL IMPLICATIONS FROM THE 'WAR ON TERROR'.

The 'War on Terror' (WOT) doctrine was launched in the aftermath of the events of 9/11. President Bush and the US National Security Agency (NSA) did not define the contours, nor elaborate on the legal implications of this doctrine, but they did set out the parameters of intended action. The following excerpt is indicative of this new policy:

'Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. …

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat. …

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no

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[107] For an excellent discussion of how the attacks were a turning point in the evolution of international terrorism, see: Smith, P., *Transnational terrorism and the Al Qaeda model: confronting new realities*, (Parameters, 2002), p. 33. See also: Howard, M., What's in a name? How to fight terrorism, *Foreign Affairs*, (January/February 2002), p. 8, which argues that declaring a .war on terrorism was a .terrible and irrevocable error. See: ibid, p. 8.

rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime'[108].

It is evident that WOT action necessitates radical reappraisal of the ability to employ force against non-State entities, as well as the ability to employ force against States that one deems to have terrorist links or that constitute a future danger without an armed attack having taken place. As regards the second radical reappraisal of international law stemming from the WOT doctrine, the ability of States to employ force against non-State entities and States unilaterally presumed to constitute future threats, it is obvious that terrorism has become a pretext for the broadening of the scope of self-defence. Chapter 3 of the current thesis is dedicated to addressing this matter from the point of view of the legality of such action on the basis of the UN Charter and emerging customary international law. In this section it suffices to state that the War on Terrorism is not necessarily a 'war', or to be more precise, an armed conflict in its legal sense. Primarily, however, it involves the invocation of a unilateral right to bypass both the Security Council and the customary provision of Article 51 of the UN Charter, such that allows the invoking State to disregard the inter-State structure of Article 51 and determine for itself evidence that would somehow justify a pre-emptive strike[109]. Since the WOT doctrine is designed to attack 'terror' against the USA and its allies, every terrorist threat, large or small, may be attacked. In this sense, a discussion of self-defence in its traditional setting is fruitless because if every terror threat is relevant, the concept of 'armed attack' is of no more significance. On the other hand, if the victim

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[108] President Bush Address to a Joint Session of Congress and the American People (20 Sep. 2001), available at: http://news.findlaw.com/hdocs/docs/gwbush/bushspeech20010920.html

[109] See: idid; 2003 US National Strategy on Terrorism, p. 15, where it is stated that 'We cannot wait for terrorists to attack and then respond'.

State of the WOT doctrine were to respond to such action, it is uncertain what the position of the USA would be with regard to self-defence under Article 51 UN Charter.

Despite the fact that international terrorism represents an unprecedented threat, the choice between dealing with terrorism in the context of war has crucial consequences. If for example the Yemen incident[110] is perceived as a criminal law enforcement measure it obviously violated international law[111]. On the other hand if it is perceived as an incident in the 'war on terror' all involved were to be regarded as legitimate targets[112]. Therefore if the fight against terrorism is a war in the legal sense of the term all terrorist enemies become automatically legitimate targets. The ambiguity of the term terrorism however, opens the way to creating a class of enemies based on unidentifiable status of the group. Such an approach is in conflict with the main approach of criminal law, which preserves the rights of the innocent.

Despite the fact that terrorist attacks may lead to an armed conflict- as was the case of Afghanistan- the current legal position is quite straightforward: the 'war on terror' is not an armed conflict as this is defined in international law. The US policy decision to adopt such a doctrine and the extent to which such a doctrine is adopted or rejected by the international community do not alter the law as it stands. Although international law is constantly evolving it seems that such a change with regards to the application of international humanitarian law to terrorism is likely to be slow.

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[110] www. guardian.co.uk/alquida/story.

[111] Lowe, V., Clear and present danger: responses to terrorism, 54 *ICLQ* (2005), p. 186.

[112] Ibid. Also: Hersh, S. M., The Bush administration's new strategy in the war against terrorism, *The New Yorker*, (23-30 December 2002), p.p.66-73.

CONCLUSION

Much like other social phenomena, terrorist violence has undergone a process of legal and political refinement. Its legal aspects are of little value without reference to its other permeating facets, which shape its very raison d'êtr[113]. Those social processes that have informed the present international law on terrorism are characterized by a popular abhorrence towards all indiscriminate violence, whether it is termed political or otherwise. This has not always been the case, even in recent history, as is evidenced from the fact that all pre-1996 anti-terrorist conventions contained the so-called political offence exception. This may be explained crudely, but to a very large extent, from the fact that the process of decolonisation coincided with the post-1950's left-wing political violence in South America – which later turned to urban terrorism, spreading thereafter also to western Europe – and the PLO struggle against Israel - all of which were viewed sympathetically by the newly emergent developing countries and the Arab world. The collapse of traditional power structures in the post-Cold War period has exposed power vacuums, which in turn have created identity crises, thus sparking various forms of fundamentalism, whether religious or ethnic[114]. Unlike other types of non-permanent ideologies (such as those of left-wing terror groups) whose use of violence may become abhorrent to its popular base and eventually lose all popular credibility, religious and ethnic fundamentalism reflects the core ingredient of large social groups, where the portrayal of victimization of the entire group is manipulated by the perpetrators for justifying their violence.

Political violence until the mid 1960's had an international ideological basis, it was nonetheless spatially limited, and as such it was dealt with on the basis of the unilateral domestic model [i.e. on a

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[113]See: Report of the [Secretary-General's] Policy Working Group on the United Nations and Terrorism, UN Docs. A/57/273-S/2002/875 (6 Aug. 2002), Annex, p. 8, where it is stated that in order 'to overcome the problem of terrorism it is necessary to understand its political nature as well as its basic criminality and psychology'.

[114] Nasr, K. B., *Arab and Israeli terrorism: the causes and effects of political violence, 1936-1993*, (McFarland, 1997).

purely domestic basis in both its legal and enforcement dimensions]. From the 1960's political violence began manifesting itself beyond national frontiers and threatened the security of civil aviation. The introduction of this international element alone shifted the counter-terrorism approach from a fully unilateral domestic to an inter-state co-operation model. Since the early 1960s, much of the physical conduct comprising terrorist acts has been criminalized in numerous sectoral anti-terrorism treaties. Each contracting party is under the duty to co-operate in and give assistance to the repression of terrorism, the apprehension and punishment or extradition of alleged perpetrators of terrorism acts. The effectiveness of specific anti-terrorism conventions is questionable since the enforcement of the existing instruments depends much on the political willingness of states parties to support the international co-operation in criminal matters. Often the exceptions provided under the political offence exception, have allowed terrorists to find safe heavens. However, the adoption of the Terrorist Bombing and Financing of Terrorism Conventions is evidence of the determination of the international community to deal with the phenomenon of international terrorism.

Resolutions of the General Assembly since the 1970s, and of the Commission on Human Rights since the 1990s[115], have stated that international terrorism may threaten international peace and security, friendly relations among States, international co-operation, State security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention take a similar position, while various regional instruments also highlight the threat to international peace and security presented by terrorism[116]. Fortunately, an obstacle sustained in the past and relating to the 'political offence' exception to terrorist offences, has gradually been removed from contemporary treaties, while its

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[115] UNComHR Res. 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37, UNSubComHR Res. 1994/18, 1996/20, 1997/39, see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24.

[116] Inter-American Convention, Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan. 2004; OAS Convention; ASEAN, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, OSCE, Bucharest Plan of Action for Combating Terrorism, 4 Dec 2001, MC(9).DEC/1, Decision on Combating Terrorism (MC(9).DEC/1); EU Commission Proposal, Explanatory Memorandum, op cit, 3, 8.

application in the traditional anti-terrorist conventions has lost favour among signatories[117]. The anti-terrorism conventions do create a very useful and strict legal regime, and post 9/11 some 80 states have become party to all of them. But many countries ratify these conventions without proceeding to adopt internal enforcement measures, without which these conventions can have no practical effect. Moreover, many provisions in these conventions leave much to the discretion of states in terms of interpretation and application, which has an impact on their effective implementation. For example, it is a state's discretion to decide whether an act is an extraditable offence, and if not, whether the offender would stand trial before the national court.

The twenty-first century has a much different enemy to face. Contemporary terrorism is multifaceted, but at the same time we are aware that its principal exponents possess two new elements, missing in the past; a) religious fundamentalism carries with it large popular support in like-minded countries and, to a significant degree, religiously affiliated people across the world, and; b) as a result the infliction of severe casualties does not distort the image of the group vis-à-vis its popular basis, and it might in fact enhance it. It is impossible to speak about the modern threat of terrorism without considering the role of non-state actors. Many of the largest and most threatening terrorist networks, including Al Qaeda, operate beyond state control or sponsorship.

Modern non-state terrorism seems to be employed by more autonomous, loosely structured internationalized networks. Those new trends in the emergence of non-state terrorism have riveted international attention on the phenomenon of international terrorism and have sparked off new controversy on the international implications of terrorism and what can be done about it. In the meantime, since the 'war on terror' was declared and the war on Al Qaeda was launched with the attack on Afghanistan, we witnessed the proliferation of counter-terrorism measures. In fact after the

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[117] Arts. 5, 9, 11, 1998 Terrorist Bombing Convention, 37 *ILM* (1998), 247; and Arts. 6, 7, 11, 2000 Terrorist Financing Convention, 39 *ILM* (2000), 270.

terrorist attacks of 11 September 2001, the Council shifted to regarding 'any' act of international terrorism as a threat to peace and security[118]—regardless of its severity or international effects—and abandoning its previously calibrated approach to examining the impact of specific acts. In the last chapter of the thesis it will become evident that the international community is now more willing than ever to focus on terrorism as a phenomenon irrespectively of the underlying motives.

It became obvious in the present chapter that as a matter of treaty law state parties to the anti-terrorism conventions are obliged to criminalize the conduct in domestic law. However, terrorism per se is not a discrete crime under treaty law, mainly because it has never been possible to formulate a generally accepted definition of terrorism in international law. What are the practical implications of such an absence of an international definition of terrorism? How the lack of a definition affects the operation of the international legal order? These are the main questions addressed in the next chapter.

[118] UNSC Res 1368 (2001).

CHAPTER 2

THE QUESTION AND RELEVANCE OF DEFINING TERRORISM

INTRODUCTION

As I indicated in the first chapter the UN anti-terrorism treaties criminalize particular manifestations of terrorism, not by describing the conduct as criminal but by imposing a duty of the contracting states to prosecute or extradite the alleged offender and by imposing the obligation upon states to render the said conduct an offence under their national laws. Despite the fact that there is now universal condemnation of terrorism, there is not a universally accepted definition of terrorism. As Justice Steward said 'I know terrorism when I see it'[1]. But how adequate is this as a legal basis giving rise to state obligations[2]? Can the international community function without an internationally agreed definition? Are the obligations to suppress terrorism as they are contained in the various international legal instruments affected by the absence of a generic definition of international terrorism? It could be argued that a definition of terrorism is not significant at all as is the case in the international law of minorities. Similarly to the law of terrorism, the question of what constitutes a minority in terms of international law has remains unanswered. The main reason is that no abstract definition is fully capable of covering the broad variety of relevant situations in the world involving some 3000 to 5000 different groups qualified as minorities in existing treaties[3]. Similarly terrorism has taken so many forms that it is impossible to

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[1] See: Jocabilis v. Ohio US 378:184, 197 in Arend, A., and Beck, R., *International law and the use of force*, (New York, 2001), p.140. I know a (national) minority where I see one. The High Commissioner Max van der Stoel has repeated this statement on several occasions. For example see: Van der Stoel, M., Prevention of minority conflicts, in Sohn, L.B., *The CSCE and the turbulent new Europe*, (1993), p. 148.

[2] See: Duffy, H., *The war on terror and the framework of international law,* (Cambridge University Press, 2006), p. 17.

[3] Akehurst's, M., *Modern introduction to international law*, (Routledge, 2003), p.105.

render all the different manifestations of the phenomenon into a single definition. Obviously the major reason is the ambit of inclusiveness and exclusiveness of certain acts within such a definition.

In the present chapter it is not my aim to provide a definition of terrorism, but rather to discuss the possibility of formulating a generally accepted definition on terrorism and the relevance (usefulness) of such a definition. Professor Cassesse, among others, argues that there is currently a consensus with regards to the notion of terrorism and that terrorism amounts to a customary international law crime[4]. However, the practice of states in defining terrorism and the different approaches adopted indicate that there is no currently an accepted definition of terrorism. The Draft Comprehensive Convention as the only convention containing a definition of terrorism and the 1566 Security Council resolution are the only international instruments to date, which provide a definition of terrorism. The definitions contained therein –although of an informal character- may be used as guidance to the states when drafting their own national definitions.

Given the impossibility of formulating a generally accepted definition of terrorism I further question as to whether there is a gap that the international community of states need to fill in. The need for a definition has been doubted in the literature, particularly in the legal literature. Stressing the inability of the international community to agree on a definition of terrorism and referring to the piecemeal approach the states do agree upon, authors like Levitt and Baxter[5] argue that it is possible and better to continue the way the states act at the moment and combat terrorism without defining the term, because the term does not have any legal significance. Does the absence of a generally accepted definition limit

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[4] See: Cassesse, A., *International criminal law*, (Oxford University Press, 2003), p.120. Similar are the views of Paust, J., according to whom international terrorism is a recognizable international crime under customary international law, which confers universal jurisdiction over terrorism. See: Paust, J., Addendum: prosecution of Ms. Bin Laden et al for violations of international law and civil lawsuits by various victims, 77 *American Journal of International Law Insights*, (21 September 2001).

[5] Levitt, G., Is terrorism worth defining? 13 *Ohio Northern University Law Review*, (1986), p.p.97-116. Also: Baxter, R., A sceptical look at the concept of terrorism, 7 *Arkon Law Review*, (1973/74).

the cooperation models? I support the view that international efforts to tackle terrorism have not been paralysed by the absence of an internationally accepted definition. Specific conventions dealing with specific manifestations of the phenomenon, along with further recent developments (discussed in later chapters) provide the legal framework to address acts of terrorism. The problem lies not with the absence of an internationally accepted definition of terrorism but with the vague and ambiguous national definitions, which result in the poor enforcement of existing norms.

1. THE DIFFICULTIES IN DEFINING TERRORISM

'Terrorism' is a powerfully emotive word in the contemporary lexicon[6]. The emotive nature of the subject matter, the term's derogatory thrust and the relevant political discourse are major contributory factors to the complexity of the concept[7]. In spite of the spread of ideologically motivated violence throughout the world[8], international law still appears incapable of coming up with a universally accepted definition of terrorism and of controlling the violent acts this entails[9]. Moreover terrorism, as Laqueur observes, has taken so many forms that 'any explanation that attempts to account for all its many manifestations is bound to be either vague or altogether wrong'[10]. As I indicated in the first chapter terrorism indeed has taken so many forms throughout history that the definition of the

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[6] See: Kegley, C., (ed.), *International terrorism: characteristics, causes, control*, (St. Martins Press, 1990), p.p.1-6; for the political dimension of terrorism, see: Jenkins, B., *International terrorism: the other World War*, (RAND, 1985), p.p. 27-38. See also: Antonopoulos, G. A., On the definition of terrorism, 14 *Terrorism and Political Violence (*2002), p. 156.

[7] For the difficulties involved in offering a comprehensive definition of the phenomenon of terrorism, see: Griffith, L. N., Organised crime in the Western Hemisphere: content, context, consequences and countermeasures, 8 *Low Intensity Conflict and Law Enforcement* (1999), p. 8.

[8] Despite the definitional problems involved, US sources estimated that only in 1995, 440 terrorist acts took place all around the world. According to the same sources, there is a decrease in terrorist attacks during the last decade. US Department of State, *Patterns of Global Terrorism* (1995).

[9] See: Evans, A. E., Murphy, J. F., (eds.), *Legal aspects of international terrorism*, (Lexington Books, 1978), p.p.12-20; Lockwood, B. B., Preliminary thoughts towards an international convention on terrorism, 68 *AJIL* (1974), p. 69.

[10] Laqueur, W., *The age of terrorism*, (Little Brown, 1987), p. 17.

phenomenon seems a rather mission impossible. Indeed, no theory has emerged from political science, criminal justice, economics, philosophy or any other discipline to satisfactorily explain terrorism. The fact that acts of terrorism affect relations between States in one way or another, engender tensions and provoke conflicts, offer some explanations as to why it is so difficult to come up with a precise definition[11]. Every effort to define international terrorism has met the vehement resistance of some governments who in absence of commonly shared values and agreed goals and means, prefer the ambiguity of the term[12]. Thus, the questions as to what constitutes terrorism and who is a terrorist still remain unanswered as a matter of a universally shared conception based on commonly held values among all States. The fact that no definition exists is self-explanatory. The concept itself constitutes a phenomenon that is so complex, multi-faceted and polymorphic that cannot readily be made subject to the rigid confines of a semantic definition, or distinguish itself from related concepts[13]. Apart from this, the term has been abused excessively from common use, especially by the mass media[14], frequently utilised in a gross and flippant manner. Indeed, virtually any act of violence that is perceived as directed against society is often labelled 'terrorism'[15].

It is indeed an extremely difficult task to create a definition that could cover all the varieties of terrorism that have appeared throughout history[16]. Systematic terror has accompanied general wars,

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[11] Sofaer, D. A., Terrorism and the law, 64 *Foreign Affairs*, (1986), p. 903. See also Cooper, H. H. A., Terrorism-the problem of definition revisited, 44 *American Behavioral Scientist*, (2001), p. 881.

[12] Schmid, A., The response problem as a definitional problem, in Schmid, A, Crelinsten, D. R., *Western responses to terrorism*, (Frank Cass, 1993), p. 7.

[13] Hoffman, B., *Inside terrorism*, (Indigo, London, 1998), p.p. 13-15.

[14] On the symbiotic relationship between media and terrorism, see: Weimann, G., Conrad, W., *The theatre of terror: mass media and international terrorism*, (Longman, 1994); Wilkinson, P., The media and terrorism: a reassessment, 9 *Terrorism and Political Violence* (1997), p. 51. Also, Hess, S., Kalb, M., The media and the war on terrorism, 80 *Journalism and Mass Communications Quarterly*, (2003), p. 986.

[15] Loverdos, A., *On terrorism and the political offence*, (Sakkoulas, 1987), {in Greek}. See also: Post, J. M., Terrorist on trial: the context of political crime, 28 *Journal of the American Academy of Psychiatry and Law*, (2000), p. 171.

[16] Forte, D., Terror and terrorism: there is a difference, 13 *Ohio NULR* (1986), p. 41.

civil wars, and revolutionary wars, wars of national liberation and resistance movements against foreign occupiers. In most cases terrorism was no more than one of several strategies, and usually a subordinate one. The controversies associated with the definition of terrorism has been the subject of interest to many academics. Indeed the academic approaches to terrorism have produced a number of possible definitions[17], which is analogous to the analysts that have dealt with the phenomenon. The obvious difficulty in conjecturing one and only definition[18] confirms the existence of the various political tendencies involved in the effort to define political violence. A proposed definition that has attracted the attention of the academic community is the one proposed by Schmid. From all the collected definitions[19] the author concluded that only 5% of academic opinion equates terrorism with common crime[20], 30% refers to terrorism as a method of warfare[21] and 83% regard politically

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[17] In his book 'Political Terrorism' he cites 109 different definitions of terrorism all of which he obtained through a survey of leading academics in the field. From these definitions he concluded that: 'Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or State actors for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population and serve as message generators. Threat and violence-based communication processes between terrorist [organizations] [imperilled] victims and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought'. See: Schmid, A., Jongman, A., *Political terrorism: a new guide to actors, authors, concepts, databases, theories and literature*, (North-Holland Publishing Co, 1988), p. 28. On the general validity of this definitional approach, see: supra note 12, p. 8.

[18] On the difficulty of defining terrorism, see: Malik, O., Enough of the definition of terrorism! Royal Institute of International Affairs, *RIIA,* (2001); Schmid, A., *Political terrorism: a research guide* (Transaction Books, 1984). Schmid devotes more than 100 pages grappling with the question of a definition, only to conclude that none is universally accepted.

[19] Cooper, H., Terrorism: the problem of definition revisited in H. Kushner (Ed.), *Essential readings on political terrorism*, (Lincoln, NE: Gordian Knot Books, 2002), p.p. 1–16.

[20] The analysts who regard terrorism as an act of violence that creates fear and carries with it the intention to murder a victim or destroy its property are the ones who equate terrorism with common crimes. See: Jenkins, B., *Combating terrorism: what works? what doesn't*, Council of Foreign Relations Policy Impact Panel, Washington D.C. 11 October 1996, p. 12.

[21] Silke, A., Terrorism and the blond men's elephant, 8 *Terrorism and Political Violence*, (1996), p. 12. The author believes that the definitions that tend to compare terrorism with warfare are confusing and should be avoided due to the fact that they themselves avoid any examination of the causes of terrorism. For a further discussion on the difference between terrorism and warfare, see: Crozier, B., *The rebels: a study of post-war insurrections*, (Chatto and Windus, 1960), and *Theory of conflict*, (Scribner, 1975); Raymond, A., *Peace and war*, (Wiedenfeld and Nickolson, 1970), p. 170. Also: Schmid, A., Frameworks for conceptualising terrorism, 16 *Terrorism and Political Violence*, (2004), p. 197.

motivated violence as the basic ingredient of terrorism. The key point about terrorism, on which the majority agrees, is that it is politically motivated. In fact, terrorism is primarily a political act: the aim of the activity is political when its goal is to attain political objectives, such as regime change, a change of people in power, or a change of social and economic policies[22].

Other analysts also suggest that 'the major problem in the study of terrorism is the constant discussion on its definition'[23]. In fact, there are those who find the possibility of a general agreement on a definition as highly unlikely[24]. In 1977 Walter Laqueur predicted accurately that 'the disputes about a detailed, comprehensive definition of terrorism will continue for a long time, they will not result in a consensus and they will make no notable contribution towards the understanding of terrorism.' Attempts to incorporate all the many manifestations of terrorism within a single definition were doomed from the start[25].

Allow me now to proceed to an examination of international and regional efforts to define terrorism. By exposing the various definitions proposed in international practice, I aim at demonstrating the lack of a consistent use of the term terrorism.

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[22] Schmid, A., Terrorism and democracy, 4 *Terrorism and Political Violence,* (1992), p. 14.

[23] Poland, J., *Understanding terrorism: groups, strategies and responses*, (Prentice-Hall, 1988). Also, Long, C., Understanding terrorism: challenges, perspectives and issues, 39 *Australian Journal of Political Science* (2004), p. 223.

[24] Shafritz, J. M., Gibbons, E. F, Scott, G. E. J., *Almanac of modern terrorism*, (Facts on File Publishers, 1991), p. ix.

[25] Ibid.

2. INTERNATIONAL EFFORTS TO DEFINE TERRORISM

2.1 PRE-SEPTEMBER 11

Despite the existence of many working definitions of terrorism, it has not yet become possible to render these definitions generally acceptable within an international framework that will be adopted by an international organisation such as the Council of Europe[26], or the OSCE[27], which would subsequently clad it with the required normativity. Thus, despite the fact that terrorism is addressed by many international and regional organisations[28] and relevant instruments providing the basis for extradition and prosecution of acts, which have already been deemed as terrorist at international law, there is not a generally accepted definition of terrorism.

The only ever international attempt at codification of a single definition of terrorism, save the current negotiations within the sixth committee of the UN General Assembly, was made in 1937 through the

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[26]The work of the Council of Europe has resulted in a number of recommendations and Declarations without defining the phenomenon. See: Council of Europe, Committee of Ministers, 103rd Session, Strasbourg, (3-4 November 1998); Parliamentary Conference: 'European Democracies Facing up to Terrorism', Committee on Council of Europe, Legal Affairs and Human Rights, Strasbourg (14-16 October 1998); Decision No. CM/710/171298, Appendix 9, (item 10.2), 653rd meeting (16-17 December 1998); Ad Hoc Terms of Reference, 30 June 1999, Council of Europe, Committee of Ministers, 103rd session, Follow up Committee of the Second Summit Report, to the 103rd Session of the Committee of Ministers on the Implementation of the Action Plan and the Follow up to the Final Declaration Implementation of the Action Plan, Strasbourg (3-4 November 1998).

[27] Sapiro, M., The OSCE: An essential component of European security, *ASIL* Insight No.15 (March 1997). Although terrorism is on the top of the OSCE's agenda there is no agreement on a specific definition. See, Concluding Document of the Madrid Follow Up Meeting, pp. 34-35; Document of the Stockholm Conference On Confidence and Security- Building Measures and Disarmament in Europe, §. 25 (1986); Concluding Document of the Vienna Follow up Meeting, p. 6, paras. 8, 9, 10 (1989); Document of the Copenhagen Meeting of the Conference on the Human Dimension, §6 (1990); Chapter of Paris, p. 18 (1990); Helsinki Document Declaration (1992); Budapest Document-a) Summit Declaration § 6, b) Decisions Part IV, Chapter II, §6 (1994), Raporteurs' Report of the Warsaw Human Dimension Implementation Meeting p. 8, (1995); Lisbon Document-a) Lisbon Declaration on a Common and Comprehensive Security Model For Europe For the Twenty-First Century, p. 6, §2, -b) A Framework For Arms Control, II, §1 (FSC.DEC/8/96)-c) Development of the Agenda of the Forum For Security Co-operation, IV, (FSC.DEC/9/96); Istambul Summit (1999).

[28]OAU Convention on the Prevention and Combating of Terrorism, 1999, found at: www.untreaty.un.org Also: SAARC Regional Convention on the Suppression of Terrorism, Kathmandu, 4 November 1987, found at: www. untreaty.un.org.

League of Nations and the negotiations on the Convention for the Prevention and Punishment of Terrorism[29], which did not however receive the required number of ratifications and was finally abandoned. Under Article 1(2) of that Convention the expression 'acts of terrorism' meant criminal acts 'directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or to the general public'[30]. The provision just cited raises the divergence of opinion as to the formulation of a wide or narrow definition, as well as an appropriate *mens rea* pertinent to the offence of terrorism through the creation of a state of terror.

Following the unsuccessful effort to create a general definition of terrorism, renewed efforts were made in the 1950s' and the 1960s' to formulate a consensus definition of international terrorism. The UN General Assembly thus commenced discussions on a US draft treaty proposal for the prevention and suppression of certain acts of international terrorism[31]. This was outvoted by developing and communist countries which, with the urging of Syria, demanded a treaty with a single definition. Western States argued that a general definition would not only be impossible to obtain, but would augment the purposes of organizations, such as the Palestine Liberation Organization (PLO), in their efforts to distinguish between terrorism and national liberation movements. The West feared that the large number of newly independent States would have favoured a definition distinguishing the two concepts, thus justifying violence against its allies. Moreover, a wide-embracing definition would have resulted in labelling Israel a terrorist State, with whatever implications this characterization may have carried[32]. Nonetheless, a compromise was reached and a Special Commission was established by the General Assembly between 1972-79 to examine the matter. During this time, developing nations argued that terrorism should be viewed from its root causes, such as racism, colonialism, occupation

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[29] (1938) 19 LNOJ 23.

[30] See: Cassesse, A., The international community's legal response to terrorism, 38 *ICLQ (*1989), p. 591.

[31] See G.A. Res. 3034 (XXVII) (18 Dec. 1972).

[32] America and Israel: The unresolved peacemaker, *The Economist*, (4 Oct. 2001).

and apartheid, and be differentiated from action undertaken by national liberation movements. Nothing concrete emerged from these discussions, as Western States vociferously opposed the above proposals. From 1979 onwards it was the Sixth (legal) Committee of the General Assembly that became the forum for discussions on terrorism and since 1985 the Syrian proposal has either been raised in brief or abandoned from the Committee's agenda. It has once more resurfaced ever since the General Assembly established an *Ad Hoc* Committee to examine the possibilities of adopting a number of subject-specific treaties, as well as a comprehensive convention[33].

The work of the Ad Hoc Committee led to the adoption initially of the 1963 Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft[34], and later the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft[35], and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation[36]. Similarly, the rise in kidnappings in the 1970s gave rise to two relevant universal treaties, and this was also true of maritime terrorism that does not fit the definition of terrorism, theft of nuclear materials – although not exclusively reserved for terrorist theft – and terrorist bombings and terrorist financing in the late 1990s[37].

In December 1999 the UN General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism[38] after negotiations that commenced in 1996[39] and which, unlike

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[33] See Report of the Ad Hoc Committee, Sixth sess. (28 Jan. – 1 Feb. 2002), UNGAOR 57th sess., UN Doc. A/57/37/Supp. No. 37 (2002).

[34] 2 *ILM* (1963), 1042.

[35] 860 *UNTS* 105; 10 *ILM* (1971), 133.

[36] 974 *UNTS* 177; 10 *ILM* (1971), 1151.

[37] Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 *UNTS* 15410, International Convention Against the Taking of Hostages, New York, 18 December 1979, 1316 *UNTS* 21931, Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979, 1456 *UNTS* 24631, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome 10 March 1988, *IMO* DOC SUA/CONF/15/REV.1 For all the aforementioned convention dealing with specific manifestations of terrorism see: Bassiouni, M., *Intenrational criminal law*, (New York, 1999).

[38] 39 *ILM* (2000), 270; see: Morris, V., Pronto, A., The work of the Sixth Committee at the Fifty-Fourth session of

previous anti-terrorist conventions, does not focus on any one particular manifestation of terrorism (hijacking, bombing etc.), but provides an indirect generic definition describing terrorism as:

'Any act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or to abstain from doing an act[40]'.

None of these instruments define terrorism, but they rather set out a general framework of state obligations. Likewise they contain obligations for state parties to cooperate in the process of investigation and suppression of terrorist activity. Moreover, they do not criminalize conduct themselves but impose obligations upon states to criminalize such conduct under their domestic laws. As it will become evidence from the following section the debate regarding a definition of terrorism was far from over within the work of the Committee.

2.2 INTERNATIONAL DEBATE OVER DEFINING TERRORISM: POST-SEPTEMBER (INTERNATIONAL AND REGIONAL)

One of the most recent attempts of the United Nations to adopt a definition of terrorism resulted in the elaboration of a proposed definition, as this is included in the Draft Comprehensive Convention

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the UN General Assembly, 94 *AJIL* (2000), p. 585; see also EC Council Recommendation of 9 Dec. 1999 on Co-operation in Combating the Financing of Terrorist Groups (O.J. C 373, 23/121999).

[39] The Convention was adopted following a French proposal. See: Working Document Submitted by France on the Draft International Convention for the Suppression of Financing of Terrorism, UN GAOR, 54th sess., Supp. No.37, UN Doc. A/54/37, Annex II (1999), p.14.

[40] See: article 2(1), (b).

relating to terrorism. Despite this recent attempt which arguably demonstrates the determination of the international community to condemn terrorism in all its forms and manifestations[41], the old divisions that lead to the thematic treaties adopted in the past continued to characterize the negotiations to the present day. The following is the proposed definition of terrorism as it applies to the comprehensive convention on terrorism:

'Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment: or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act[42]."

A close examination of the aforementioned definition demonstrates the effort of the UN to formulate a neutral and flexible definition that could be universally accepted. The definition falls short in terms of its completeness, even though it does include some important aspects ignored by other definitions. It includes as terrorists those who plan, facilitate, direct, and support terrorist offences. It includes acts against the environment and economy. It also includes threats as terrorist acts, which are some of the

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[41] See: UN DOC. A/C.6.56/L.6 para, 1 of annex iv, part a, Report of the Working Group of the Sixth Committee on Measures to Eliminate International Terrorism, 29 October 2001.

[42] Draft Comprehensive Convention on International Terrorism, 6th Comm., 56th Sess., Agenda Item 166, U.N. Doc. A/C.6/56/L.9

most effective forms of terrorism. Yet it falls short in other areas as it only applies to attacks upon persons that cause death or serious bodily injury. Excluded altogether are acts such as kidnapping, hostage taking, and psychological torture.

Despite the fact that the negotiations on the draft convention are now completed, there seems not to be an agreement on specific issues that prevent the adoption of the convention. An outstanding issue relates to the potential authors of the terrorist act. The negotiations departed from the debate around the qualification or not of oppressive states versus liberation movements as terrorists by treating the question not as part of the definition[43]. Indeed article 18 states that the convention does not apply to the activities of armed forces during armed conflict. Such an article was not particularly welcome by the majority of delegations who wanted to ensure that if state forces are excluded from the scope of the convention, those that they consider as freedom fighters or national liberations movements fighting against those forces should be also excluded[44]. Whereas the main disagreement regarding the nuclear terrorist treaty regards its scope and the inclusion or not of the military within its ambit,[45] the comprehensive convention lacks consensus on a common definition and is problematic in respect of the following: a) its relationship to other sectoral conventions, primarily to ensure legal certainty in the application and interpretation of both the comprehensive and sectoral conventions, and; b) the differentiation between self-determination struggles and terrorism[46].

The fact is that despite the obvious ideological divisions between states, the international community has reiterated the urgency of adopting a comprehensive convention on international terrorism. The

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[43] See: supra note 2, p. 22.

[44] Ibid.

[45] Report of the Working Group, UN Doc. A/C.6/57/L.9 (16 Oct. 2002).

[46] Report of the Ad Hoc Committee, Fifth session (12-23 Feb. 2001), *UNGAOR* 56th session, UN Doc. A/56/37/Supp. No. 37, Annex V, pp. 12-14.

reality however, does not reflect the political will to adopt such a legal instrument as the content and scope still remain the issue of the present debate.

On a regional level and despite the proliferation of regional conventions that address terrorism, it is only the League of Arab States[47] and the Council of Europe[48] that provide a definition of terrorism. It should be stressed that prior to the September 11 attack, the thematic approach was adopted also at a regional level. Hhowever, after September 11 the Commission of the EU presented a proposal to the European Council for a framework decision on combating terrorism, intended to arrive at a common European definition of terrorism. The approach of the EU differs considerably from the approach of other regional organisations, such as the African Union[49], and the South Asian Association for regional cooperation[50], which adopted convention without actually providing a general definition of terrorism. The Framework Decision adopted on 13 June 2002 provides:

Terrorist offences include the following list of intentional acts, which given their nature or their context, may seriously damage a country or international organization where committed with the aim of: a) seriously intimidating a population

b) unduly compelling a government or international organization to perform or abstain from performing any act

and c) seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or international organization.

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[47] See: Arab Convention on the Suppression of Terrorism, adopted in 22 April 1998.

[48] Commission proposal for a Council Framework Decision on Combating Terrorism, 19 September 2001, COM, 521.

[49]See: OAU Convention on the Prevention and Combating Terrorism, 1999, see: www.untreatry.un.org

[50] SAARC Regional Convention on the Suppression of Terrorism, Kathmandu, 4 November 1987, www.untreaty.un.org.

Despite the fact that such a broad definitional approach demonstrates the determination to deal with all the dimensions of the phenomenon of terrorism it still is a model applicable solely on member states and it thus lacks universality.

3. INTERNATIONAL TERRORISM AS A DISCRETE INTERNATIONAL CRIME UNDER CUSTOMARY INTERANTIONAL LAW?

Given the absence of a generally accepted definition of terrorism under treaty law, it is questionable whether international state practice has been consistent in the use of the term terrorism. Such consistency could support the view that there is indeed a definition of terrorism in international customary law. However, all the international instruments mentioned above indicate that there is inconsistency in the way the international community of states uses the term terrorism.

Despite the clear application of the indicated existing anti-terrorism conventions solely to international terrorism, meaning acts with a transnational element as opposed to domestic terrorism- there are many variation with regards to the elements of the offence, i.e to the *actus reus* and *mens rea* of the offence. Indeed one of the elements which differ between international instruments relates to the clarification of the *actus reus* element of a terrorist act. If we compare for example article 2(1) of the 1999 UN Convention on the Suppression of the Financing of Terrorism to the Draft Comprehensive Convention we see considerable variations with regards to description of the material element of the offence.

With regards to the political nature of an offence, there seem to be only two possible ways of addressing the problem; either by removal of all excuses and defences from a future treaty, whether during negotiations or as a result of an unequivocal consensus shaped through time, or; by achieving a definition that contains a provision explicitly describing all possible defences, such as the 1998 ICC Statute[51]. Since 1996 the international community seems to have moved very close to the former option. Indeed, this is confirmed by Article 6 of the 1999 International Convention for the Suppression of the Financing of Terrorism[52], which prohibits justification of the relevant acts on the basis of political, philosophical, ideological, racial, ethnic, religious or other similar grounds. The issue is far from resolved, especially at the national level and with regard to domestic terrorism, but after the events of September 11, 2001, this trend was definitely set.

Despite the undeniable relationship between political crime and terrorism, since the political/ideological motive is the one that inspires terrorists, the majority of governments and authors are in favour of the de-politicizing of the acts. However, such a definitional model conceals many risks, for it restricts the perpetrator from claiming the application of favourable regulations provided by constitution, substantive penal and penal procedure law that is reserved for political offences, the most important of which is the political offence exception to extradition[53]. On the contrary, it is argued that today terrorism manifests such a gross and brutal face that is far beyond the nature of political crime[54]. Unlike persons accused with having committed common crimes and brought before the criminal courts, in which case the possible motive of the accused is irrelevant, this is not so as regards terrorist-related offences.

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[51] Part 3, 37 *ILM* (1998), 999.

[52] 39 *ILM* (2000) 270. See also Art 5 of the 1998 Terrorist Bombings Convention, 37 *ILM* (1998), 249.

[53] Loverdos, supra note 9, p. p. 114-115.

[54] Spinellis, D., Terrorism, 47 *Revenue Hellenique de Droit International* (1994), p. 447.

Furthermore, an element rather complicated and confusing, relates to the origins of the perpetrators. An example that illustrates the confusing results of the above mentioned terminology was the assassination of an Iraqi nuclear scientist in Greece, on 27 February 1995[55], for which Iraqi agents were accused. In that case, it is far more obvious that the execution of this criminal act had no connection to terrorism and that it was merely another matter related to espionage against a State[56]. Should the focus of international concern be individuals and other non-state organizations or should attention be directed towards state-sponsored terrorism?

Likewise, a generic definition has been blocked by the inability to reach a consensus on the relationship between terrorism and the so-called state terrorism on the one hand and terrorism and national liberation movements on the other. With regards to the first question as to whether states may conduct acts of international terrorism the various international instruments adopt different views. The 1991 Draft Code of Crimes against the Peace and Security of Mankind included international terrorism within the scope of crimes that can be committed by the state, while all other treaties do not address state terrorism as such, the few conventions that indeed include terrorism within the scope of crimes that can be committed by the state. Finally the issue, which continues to block the negotiations of the UN convention, relates to the distinction between terrorism and acts undertaken when people exercise their right to self-determination. Indeed such a distinction has posed the greater obstacle on the negotiations towards a definition in international practice. The 1994 Declaration was thought to be a milestone is stating that criminal acts covered by it are in any circumstances unjustifiable whatever the consideration of political, philosophical, ideological, and other nature, without reference to national liberation movements. While numerous other instruments follow the same approach the Arab and African Regional conventions expressly exempt from the terrorist definition people struggling for self-

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[55] Kathimerini [Newspaper], (28 February 1995), p. 1.

[56] Gardela, K., Hoffman, B., *The RAND chronology of international terrorism for 1987*, (RAND 1991).

determination or national liberation movements. It is obvious that states prefer the ambiguity of the term, since such ambiguity may be used by some states to deny their people's rights such as freedom of expression and religion and collective group rights such as the right to self-determination[57].

4. SHIFTING IN INTERNATIONAL PRACTICE AS EVIDENCE OF THE DEVELOPMENT OF CUSTOMARY LAW POST-SEPTEMBER 11?

The events of September 11 have undoubted changed the political climate in the world community. Moreover, the gradual demise of wars of national liberation led to a change in the attitude towards terrorism. Resolution 1368 which condemned the atrocities of September 11 and characterised the acts and any other acts of international terrorism as a threat to the peace and security, seems the determination of the Council to regard international terrorism as an international crime. The universal condemnation of terrorism and the various statements and declarations adopted after September 11 indicates the likelihood of international terrorism becoming a crime under customary international law.

As in state practice the bases of bases of international criminalization appear to be that terrorism severely undermines: (1) individual human rights; (2) the State and the political process (3) international peace and security. Numerous resolutions of General Assembly since the 1970s[58] and of

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[57] See: Pomerance, M., *Self-determination in law and practice: the new doctrine in the United Nations*, (The Hague, Nijhoff Publishers, 1982). Also: Blum, Y., Reflections on the changing concept of self-determination, 10 *Israel Law Review*, (1975), p. 509. Also: Koskenniemi, M., National self-determination today: problems of legal theory and practice, 43 *ICLQ* (1994), p. 241.

[58] UNGA Res. 3034 (1972), 32/147 (1977), 34/145 (1979), 38/130 (1983), 40/61 (1985), pmbl, 42/159 (1987), 44/29 (1989), 46/51 (1991), 48/122 (1993),49/60 (1994), 49/185 (1994), 50/186 (1995), 51/210 (1996), annexed Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, pmbl; 52/133 (1997), 54/164 (2000), see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, section I,

the UN Commission on Human Rights since the 1990s[59], have asserted that terrorism threatens or destroys fundamental human rights and freedoms. The 2002 EU Framework Decision on Combating Terrorism, which adopted a generic definition of terrorist crimes to facilitate a common European arrest warrant, similarly presents terrorism as among the most serious threats to human rights[60]. A number of other regional anti-terrorism instruments also support the idea that terrorism gravely violates human rights[61], while the preamble to the Draft UN Comprehensive Convention against terrorism, under negotiation since 2000, similarly suggests that terrorism endangers human rights. The notion of terrorism as a particularly serious human rights violation does not, by itself, constitute a compelling reason for criminalizing terrorism. Over time the international community has agreed that 'all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed' are both criminal and unjustifiable. As the Commission on Human Rights has resolved, 'terrorism.... can never be justified as a means to promote and protect human rights'[62]. A compelling rationale for criminalizing terrorism is the threat it presents to international peace and security. Resolutions of the General Assembly since the 1970s[63], and of the Commission on Human Rights since

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[59] UNComHR Resols 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 1999/30; 2000/30; 2001/37;2002/35; 2003/37; UNSubComHR resols 1994/18; 1996/20; 1997/39; 1998/29; 1999/26; 2001/18; 2002/24

[60] European Commission, Proposal for a Council Framework Decision on Combating Terrorism, Brussels, 19 Sep 2001, COM (2001) 521 Final, 2001/0217 (CNS), Explanatory Memorandum, 2-3, 7.

[61] 1998 Arab Convention on the Suppression of Terrorism, pmbl; 1999 OIC Convention on Combating International Terrorism, pmbl; 1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, pmbl; 1999 OAU Convention on the Prevention and Combating of Terrorism, pmbl; OAS General Assembly, AG/RES 1840 (XXXII-O/02), pmbl; OAS Declaration of Lima to Prevent, Combat, and Eliminate Terrorism, adopted at the Inter-American Specialized Conference on Terrorism, 26 Apr 1996, Declaration of Quito, IX Meeting of the Rio Group, adopted Sep 1995; OAU Central Organ Ministerial Communiqué on Terrorism, adopted 11 Nov 2001, Central Organ/MEC/MIN/Ex-Ord (V) Comm, OAS General Assembly, AG/RES 1840 (XXXII-O/02), Council of Europe (Cttee of Ministers), Guidelines of the Committee of Ministers on human rights and the fight against terrorism, 11 Jul 2002, pmbl [a]; European Parliament Res A5-0050/2000, 16 Mar 2000, 41-42; OIC (Extraordinary Session of Foreign Ministers),

[62] Preambles to UNComHR Resols 1996/47; 1997/42; 1998/47; 1999/2; 2000/30; 2001/31; 2002/35.

[63] UNGA resols 38/130 (1983),; 40/61 (1985), UNGA res 42/22 (1987), annexed Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, pmbl; 42/159 (1987), pmbl, 44/29 (1989), 46/51 (1991), 48/122 (1993), 49/60 (1994), pmbl, 49/185 (1994), 50/53 (1995), 50/186 (1995), 51/210 (1996), annexed Declaration to Supplement the 1994 Declaration on Measures to

the 1990s[64], have stated that international terrorism may threaten international peace and security, friendly relations among States, international co-operation, State security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention and the Draft UN Comprehensive Convention take a similar position, while various regional instruments also highlight the threat to international peace and security presented by terrorism[65]. Most explicitly, from the early 1990s, the Security Council increasingly acknowledged in general or specific terms that acts of international terrorism may, or do, constitute threats to international peace and security[66]. After the terrorist attacks of 11 September 2001, the Council shifted to regarding 'any' act of international terrorism as a threat to peace and security[67]— regardless of its severity or international effects—and abandoning its previously calibrated approach to examining the impact of specific acts. In addition, the Council now involves itself in *domestic* terrorism—such as the Madrid bombing (wrongly attributed to ETA) in Spain[68]. Historically, the Security Council refrained from defining terrorism, and between late 2001 and late 2004 permitted States to unilaterally define the scope of terrorist crimes in national law. In resolution 1566 of October 2004, it finally adopted a generic definition of terrorism, combining elements from a 1994 General Assembly Declaration (provoking a state of terror) and the 1999 Terrorist Financing Convention (intimidating a population, or coercing a government or international organization). While

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Eliminate International Terrorism, pmbl.

[64] UNComHR resols 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37, UNSubComHR resols 1994/18, 1996/20, 1997/39, see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Part I), ch III, s I.

[65] Inter-American Convention, pmbl; Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan 2004; OAS Convention, pmbl; SAARC Convention, pmbl; NAM, XIV Final Document, Durban, 17-19 Aug 2004, 100; NAM, XIII Conference of Heads of State or Government, Final Document, Kuala Lumpur, 25 Feb 2003, ASEAN, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov 2001, pmbl; OSCE, Bucharest Plan of Action for Combating Terrorism, 4 Dec 2001, MC(9).DEC/1, annex, para 1; Decision on Combating Terrorism (MC(9).DEC/1); EU Commission Proposal, Explanatory Memorandum, op cit, 3, 8.

[66] 1999);1333 (1999); 1363 (2001); 1390 (2002); 1455 (2003); 1526 (2004), 1535 (2004); see also 1269 (1999)..

[67] 74 UNSC Res. 1368 (2001),

[68] UNSC Res. 1530 (2004).

there are legitimacy costs in circumventing the usual multilateral treaty negotiation context, the definition may at least constrain more draconian national definitions in future.

The fact that terrorism is now perceived as a threat to the peace by the Security Council demonstrates the will of the Security Council to concern itself with acts the international character of which is not so evident. For example Resolution 1465 of 13 February 2003 addressing the bombing of a night club in Bogotá., is an act which does not seem to present any link with other jurisdictions as it has been perpetrated on Colombian territory, by a Colombian group and resulting in the death of Colombian victims[69]. In resolution 1464 the Council determined that any act of terrorism and not only those with an international dimension amounts to a threat to peace. The same was repeated in further resolutions such as 1530 of 11 March 2004 on the bombing in Madrid, as well as 1566 of 8 October 2004. In late 2004, the Secretary General of the United Nations presented the Report of the High-Level Panel on Threats[70], Challenges and Change to the General Assembly suggesting that acts of terrorism should be illegal at international law. Such a suggestion seems to advocate for a change in direction from the current approach of using international law to declare certain acts should be criminalized in the domestic law of each signatory party.

Similarly the Security Council especially after the September 11 has gone further and called on states to take broad-reaching measures against international terrorism, including criminalizing such conduct. However, none of the UN General Assembly resolution and Security Council resolutions defines terrorism and thus they do not contribute to our understanding of the meaning of international terrorism in customary international law. However, all the recent resolutions illustrate shared interests in combating terrorism, irrespective of the fact that agreement on the text of a comprehensive convention

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[69] See: Sossai, M., The internal conflict in Colombia and the fight against terrorism, UN Security Council Resolution 1465 and further developments, 13 *Journal of International Criminal Justice*, (2005), p. p. 253-267.

[70] See: Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, UN. Doc. A/59/565, 2 DEC. 2004.

could not be reached. Similarly, Resolution 1373 despite the constant reference to terrorism does not define the term.

Professor Oscar Schachter remarks that the absence of a comprehensive definition does not mean that international terrorism is not identifiable[71]. Moreover, Brian Jenkins suggests that although there is not any international agreement on the precise definition still a rough consensus on the meaning of terrorism is emerging[72]. Given the broad support, considerable overlap in obligations recurring themes in the conventions and the endorsement of the definition of terrorism in resolution 1566 a powerful jurisprudence exists in international law sufficient for states to draw on in forming their own definitions of terrorism in domestic law.

5. DEFINING THE CRIME OF TERRORISM IN DOMESTIC LAW

States have opted to encompass ideological violence in the criminal justice system, even in times when physical threats to the wider public could be described as accidental collateral damage, or rare isolated events. The criminalization of particular behaviour, besides outlawing the act itself, carries with it a necessary social stigma that serves to alienate whatever popular basis the terrorist group may have had. Thus, the early criminalization of terrorism served the interests of the State more than it did the social and welfare interests of their citizens, particularly since with hindsight we now appreciate the social righteousness of some politically-motivated violence of past times (e.g. post WW II uprisings against

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[71] Schacher, O., The extraterritorial use of force against terrorist bases, 11 *Houston Journal of International Law*, (1989), p.309.

[72] Schmid, A., *The problems of defining terrorism*, (Encyclopedia of World Terrorism, 1997).

Communism in Hungary and Czechoslovakia, some Marxist polemic against the poverty caused by imperialism in South America, the cause espoused by the Irish Republican Army, and others). Such criminalization is easy to justify because of the existence of the element of violence, which itself is outlawed in common criminal law.

The next question for policy and law-makers was whether to create a distinct terrorist offence apart from the underlying crime that each terrorist act entailed. The choice was between the following mutually exclusive scenarios: a) rendering of a distinct terrorist offence as an aggravating circumstance of the underlying crime; b) rendering a distinct terrorist offence, albeit with mitigating or exculpating circumstances on the basis of the perpetrator's motive, or; c) treating the violence as a common crime. Since the State, against whom terrorist violence was directed, was particularly keen to alienate terrorism from its popular basis, the latter option was unable to serve that purpose as it fails to colour terrorism as the ultimate urban crime. The second formula was prevalent between the 1960's to the 1980's only in countries that did not experience terrorist violence and thus did not share the collective experience of terrorism found in other countries. This was particularly expressed through the existence of forums whose courts afforded terrorists the so-called political offence exception[73], but it is not true to say that even in these countries the incidental killing of civilians escaped criminal culpability[74]. During this time, countries facing serious terrorist problems, such as the UK, assumed a completely antithetical stance, the legislature of which most typically appended aggravating circumstances to the distinct crime of terrorism either through the substantive or procedural criminal law. This was particularly expressed through stricter detention, abbreviated trial procedures, elimination of trial by jury and relaxation of evidentiary standards (e.g. Diplock courts)[75]. The significant contemporary threat

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[73] E.g. Folkerts v Prosecutor (1978, Dutch Supreme Court), 74 *ILR* 498.

[74] Re Croissant (1978, Conseil d'Etat), 74 *ILR* 505; Yugoslav Terrorism case (1978, FRG Federal Supreme Court), 74 *ILR* 509.

[75] Northern Ireland (Emergency Provisions) Act 1978, chapter 5.

of terrorism has activated this latter approach throughout the world, although the terms of its application are more stringent in some States than they are in others[76]. States through the medium of international organisations[77] have struggled to develop a definition[78], the culmination of which is the existence of many 'working definitions'[79]. While the international community has struggled to come to a consensus as to what constitutes terrorism, individual nations have not had the same difficulty. Indeed, successive US administrations have produced a number of definitions[80] in an effort not only to clarify the phenomenon but also to establish their views internationally. The first definition by the Vice President's Task Force on Combating Terrorism[81] views terrorism as a method of political warfare

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[76] See British legislation directed primarily to the situation in Northern Ireland; Prevention of Terrorism (Temporary Provisions) Act of 1989; see also: US Public Law No. 104 302 (1996), where a federal crime of terrorism is a crime 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct' and to other crimes mentioned in US law, such as unlawful acts against the safety of civil aviation, crimes against internationally protected persons. According to the French Law of 1986, terrorist acts are crimes 'en relation avec une enterprise individuelle ou collective ayant pour but de troubler l'ordre public par l'intimidation ou la terreur,' i.e. 'terrorism' refers to individual or collective acts which aim at causing social intimidation by terror. See also: State Reports submitted to the UN CTC: Russian Federation, UN Doc. S/2002/887 (3 June 2003); Finland, UN Doc. S/2004/118 (18 February 2004); Germany, UN Doc. S/2003/671 (25 June 2003); Italy, UN Doc. S/2004/253 (29 March 2004).

[77]Although terrorism is on the top of the UN's agenda since 1972 the organisation has not agreed on a precise definition. See: Obote-Odora, A., Defining international terrorism, 6 *Murdoch University Electronic Journal of Law* (1999), p.p. 4-15. See also: Measures to Eliminate International Terrorism, GA Res. 46/51 (9 Dec. 1991) and GA Res. 49/60 (17 Feb. 1995). Similarly, the Organisation of American States (OAS) has condemned terrorism since 1994, although without defining it. See Declaration of Lima to 'Prevent, Combat, and Eliminate Terrorism' (Lima, Peru, April 23-26, 1996). The majority of the resolutions and declarations adopted by OAS follow the same patterns of the Council of Europe and the EU. See OAS Resolution Approving CEITE/Res.1/96 Framework Treaty on Democratic Security in Central America and Agreement, signed by Argentina, Brazil, and Paraguay, April 26, 1996; Hemispheric Cooperation to Prevent, Combat and Eliminate Terrorism, AG/Res. 1553 (XXVII-0/98), 2 June 1998, AG/ Res. 1399 (XXVI-0/96), 7 June 1996, AG/Res. 1492 (XXVII-0197), 5 June1997.

[78] There are many obstacles in formulating a generally accepted definition. For example Elagab, O., in his book *International law documents relating to terrorism*, (Cavendish, 1997, p. p. 35-40), offers some possible explanations. As terrorism takes many different forms, such violence is prompted by a wide range of motives and the criteria for defining terrorism is subjective, which complicates any definition of the term.

[79] In the USA many different working definition have been formulated. For example, 'premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine State agents usually', Patterns of Global Terrorism 1995, US Department of State, Washington DC (1996), p. iv. For many more USA working definitions, see: Beres, L. R., The meaning of terrorism: jurisprudential and definitional clarifications, 28 *Vanderbilt Journal of Transnational Law* (1995), p. 239.

[80] The majority of the definitions clearly demonstrate an effort to equate terrorism with crime. See: Winker, C., Presidents held hostage: the rhetoric of Jimmy Carter and Ronald Reagan, 12 *Terrorism* (1989), p. 23.

[81] Terrorist Group Profiles, *Vice President's Task Force on Combating Terrorism*, U.S. Government Printing

designed to bring about political changes. Firstly, this definition acknowledges the fact that terrorism has a political objective. However, it is rather vague in the use of the term 'political warfare', which itself is unclear. The same applies to the definition used by the US Foreign Office[82], where the use of the terms 'pre-mediated' violence 'in order to influence an audience' allows multiple interpretations. Although both definitions have obvious gaps, they are very significant in the sense that they provide an effort to examine terrorism from a political perspective. Nevertheless, the political approach does not automatically lead to political solution. Especially in the US, terrorism is tantamount to crime and war[83], while there is an absence of any political solution.

Finally, the FBI defines terrorism as 'the unlawful use of violence against persons or property to intimidate or coerce a government, the civilian population or any segment thereof, in furtherance of political or social objectives'[84]. What is particularly interesting in that definition is the reference to the objectives of the terrorist activity Thus, the FBI's definition is one of the few codified definitions that is cited and employed as a standard reference point. It should be mentioned, however, that the U.S. Government cannot agree on a single definition and every institution interprets and defines the phenomenon in its own way and for its own particular purposes[85]. Most governmental entities simply adopt a working definition that justifies and supports their organizational charter (defines mission, dictates organizational framework, authorizes the performance of specific functions, and provides the necessary resources).

Office, (Washington D.C., 1988).

[82] 22 USC § 2656(d).

[83] New York Times, 4 April 1984, p.13. See also: Congressional Research Service, The Library of Congress (September 1984), in Bossi, M., *Terrorism in Greece: national and international dimensions*, (Sakkoulas, 2000), {in Greek}, p. 179.

[84] The FBI defines both domestic and international terrorism. See: Johnson, P., Feldman, T., Personality types and terrorism: self-psychology perspectives, 5 *Foreign Reports* 1992, p.293. See also Ricks, B. A., Future of domestic and international terrorism-the FBI Perspective, 11 *Terrorism (*1988), p. 538.

[85] The USA defines terrorism in various ways that are to be analysed during the course of this thesis.

Article 1(1) of the UK 2000 Terrorism Act defines terrorism as the use of threat of action where it is designed to influence the government or intimidate the public, or for advancing a political, religious or ideological cause. It is clear that the definition is rather wide[86] and could include any form of political violence. However, it is historically proven that political violence, due to its extreme and ruthlessly destructive methods, is in fact a very special event. For instance, the symbolic selection of the target, different than the genuine or actual target, is a tactic that differentiates terrorism from other forms of violence. For instance, the assassination of a member of the governmental mechanism symbolises the whole government, a member of the industrial status quo represents the whole ruling class. In reality there are two distinct targets: the direct one, who is usually the specific human target which is the victim of the most direct physical harm and the indirect, upon whom the message is addressed to. If for example, the target is a 'citizen' of a country, then the message is addressed to the 'citizens' of this particular country. Moreover, if the attack is against military headquarters the aim is to terrorize the military elite of that country. Therefore, the attack is aiming beyond the actual selected victim and intends to influence the masses. It is true that many assassinations of major public figures or representatives of law and order have a propagandist aim[87]. Despite the fact that many forms of terrorism could be included within the above-mentioned definitions, there does not exist general agreement as to the terrorist acts that are to be defined and thus only few governments have accepted it.

The UK has traditionally followed a rather strict application of territorial jurisdiction with regard to transnational crime[88]. With the demise of the IRA[89] one would think that the UK would maintain this

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[86] It is expansive enough to include animal rights activists and protestors in certain circumstances.

[87] See: Herman, E., O'Sullivan, G., *The Terrorism industry: the experts and institutions that shape our view of terror*, (Pantheon, NYC, 1989).

[88] Gilbert, G., Crimes sans frontieres: jurisdictional problems in English Law, 63 *BYIL* (1992), p. 415.

[89] The Northern Ireland issue constitutes a unique subject for analysis. It should be noted that the majority of existing analysis suggest a rather one-sided view by examining the performance of terrorist acts by the IRA and

position, but as we noted in our previous section, much like the majority of the international community, it too has expanded the ambit of its jurisdictional competence when confronting terrorism. This is evident in the 2000 Terrorism Act, which is not designed for territorial offences but covers instead offences committed abroad and against UK nationals[90], recognising, moreover, that terrorist operations require a structured organisation[91].

The Israeli position on the matter is rather rigid, as due to the conflict with the Palestinians and violent incursions into urban areas, they tend to label 'terrorists' easily[92]. There does not exist much information regarding terrorist-related arrests, detentions and trials of alleged terrorists, and at the same time the Israeli State has adopted a policy of armed combat against terrorist or other organisations without much consideration for legal settlement through the criminal justice system. As a result, it is difficult to evaluate whether Israeli normative regulation in this area possesses any legal significance for the State itself, or the 'terrorists' to whom it is addressed. This creates more tension in the region and provokes extreme reactions from both sides. The political violence or terrorism in Israel is an every day phenomenon that has all the basic characteristics of a desperate struggle. There are many instances of such violence taking place. For example, on the 6th of July 1989 a young Palestinian on his way to Jerusalem took control of a crowed bus. The bus fell into a ditch, killing 16 passengers and injuring many more. The perpetrator survived his act, and later admitted that his motive for the act was to take

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neglecting the violence directed against the Irish by the British occupation troops. See: Wilkinson, P., The role of the military in combating terrorism in a democratic society, 8 *Terrorism and Political Violence* (1996), p. 1.

[90] Sec. 1(4).

[91] Sec. 1(5).

[92] Prevention of Terrorism Ordinance (Sep. 1948, (No. 33 of 5708-1948), as amended in 1980, 1986, 1993, (Sec. 1). The basic compensation law is the Victims of Hostile Action (Pensions) Law, No.5730-1970, as amended. [5798 and 5730 are years in the Hebrew religious calendar. All official documents and newspapers carry both Common Era (CE) and Hebrew dates]

[93] See: LeVine, T. V., The logomachy of terrorism: on the political uses and abuses of definition, 7 *Terrorism and Political Violence* (1995), p. 45.

revenge for the shooting of his friend by Israelites[93]. He was eventually convicted as having perpetrated a terrorist crime. This act, as well as attacks against troops by children throwing stones can be difficult to characterise as terrorist. Israel's insistence on labelling these acts as terrorist means more tension and conflict in the region.

Violence in this region is becoming more extreme and it seems that there is no hope yet for peace. On the other hand, the violence supported by right–wing organizations does not attract the attention of the State and thus are not labelled terrorist, nor do they fall within the scope of terrorist legislation[94]. Their violence is directed against Palestinian organisations with the aim of placing stumbling blocks to any peace process negotiations. The assassination of Israeli Prime Minister Rabin on 4 November 1995 by the fanatical Yigil Amir, a Jewish Israeli that was opposed to the peace process and Israel's negotiations with the Palestinians, indicates that Israel is facing political violence from two distinct fronts. It is also evident that definitions of terrorism, and the distinction between terrorist crimes and common crimes, are part of a political agenda that is easily manipulated by States to serve their own self-interests.

The different definitions recorded, such as the ones that view terrorism as politically motivated violence[95], focus on the political element of terrorist activity and thus can very easily create confusion. Indeed, a sole political definition instead of a criminal one could include the violence that is carried out against civilians by the authorities, rather than by non-State groups. Some state definitions focus on the terrorist organisations' mode of operation, while others emphasise the motivations and the modus operandi of individual terrorists, etc. while political definitions tend to be more ambiguous in order to allow the most politically convenient interpretation of events. Following Security Council resolution,

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[94] Cohen-Magor A. R., Combating right-wing political extremism in Israel: critical appraisal, 9 *Terrorism and Political Violence* (1997), p. 82.

[95] Telhami, S., Combating terrorism; what works? what doesn't? Policy Impact Panel, *Council of Foreign Relations*, Washington D.C. (October 1996).

which requires states to criminalize terrorism in domestic law, many states enacted new laws. However, despite the proliferation of new anti-terrorism legislation, the definitions adopted differ significantly. For example the UK Anti-terrorism, Crime and Security Act 2001 extend to persons considered to have undefined links with organisations deemed to constitute a terrorist treat.

Yet the terrorist label is often invoked precisely to connote a degree of gravity, thereby to justify measures not otherwise considered acceptable. More specifically resolution 1373 obliged states to ensure that terrorist acts are established as serious criminal offences in domestic law and punished in a way that reflects their seriousness. However, the resolution does not give a general definition of terrorist acts, and in the absence of a definition at the world level states may apply their own which may be too restrictive or too wide[96]. In fact none of the Security Council resolutions referring to terrorism define it, or refer to sources on which states should rely in formulating a definition.

Certainly, whereas in the past the State did not see itself threatened by terrorism, but only domestic social order and thus dealt with terrorist offences in the same manner as other offences albeit as distinct, in the new post-9/11 era this is not the case. Most States do indeed perceive a direct threat to their overall security, and some States perceive a very real threat to their unity (e.g. Saudi Arabia) and in some cases an explicit threat to their economic interests, as is the case with animal rights 'terrorism' in the UK[97]. It is no wonder, therefore, that the multilateralism explored in this section, in both its domestic and inter-State legal dimension is the approach of the modern epoch.

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[96] See: Rosand, E., Security Council Resolution 1373, The Counter-Terrorism Committee and the fight against terrorism, 97 *AJIL* (2003), p. 340.

97 Eaglesham, J., Firn, D., Animal rights 'terrorists' to be targeted by new offence, *Financial Times* (18 Nov. 2004), which explains the UK's urgent government plans to introduce a new terrorist offence of animal rights activist violence because such violence is detrimental to the pursuit of the British

6. IS THE DEFINITION OF TERRORISM A MATTER OF OPERATIVE CONCERN?

The fact that no generally accepted definition of terrorism in international law exists give rise to the question as to whether there is negative impact on the international legal order. Does the absence necessary imply that serious acts of violence are not criminalized in domestic or international law? Or does the absence of a generally accepted definition of terrorism block international cooperation[98]?

Initially the absence of a definition of terrorism does not mean that serious acts of violence, such as those carried out in September 11 or in Madrid are not criminalized under international (and domestic criminal law). As I demonstrated in this and the previous chapter, specific manifestations of terrorism are covered by thematic conventions dealing with specific manifestation of terrorism. Indeed there is such a broad scope in the conventions that as Dugard suggests: is difficult to imagine a form of terrorism which is not covered by the existing anti-terrorism conventions[99]. All those instruments are binding upon incorporation into domestic law. Moreover, even if a state has not ratified the treaties, acts of international terrorism will be covered by ordinary domestic law, which will prohibit murder, attacks on persons and property, which are the main results of a terrorist act.

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economy to become the leader in stem cell research and biotechnology. See also: Collins, J. G., Terrorism and animal rights, 249 *Science (*1990), p. 345.

[98] Opposite was the opinion of the League of nations council according to which 'the definition is needed in order to enable international cooperation'. See relatively: Hafner, G., The definition of the crime of terrorism in Nesi, G., *International cooperation in counter-terrorism*, (Ashgate, 2006), p. 35.

[99] See: supra note 43, p. 41.

Additionally, the lack of a definition of terrorism does not signify a lack of obligations on states to refrain from participating or supporting acts of terrorism and to adopt counter-terrorism measures. Indeed all the anti-terrorism treaties and resolutions provide clear obligations for states. An indicative example is the 1373 UN Security Council resolution, which stresses out that 'states are obliged to adopt a wide ranging measures including criminalization, freezing of assets and denial of safe heavens'. Chapter five of the thesis will discuss in details these obligations.

For the purposes of cooperation between states there is a strong body of international conventions which confer obligations to states regarding international co-operation, from investigation to the prosecution of the offences prescribed therein. In such, the focus on terrorism terminology may obscure to the extent to which resort to terrorist tactics is already regulated by other international norms. While the generic definition in a global convention may serve the interest of legal certainty and the efficiency of inter-state co-operation that is clear is that its absence does not mean a legal gap or paralysis of the international legal system suppressing terrorism[100]. The main problem thus remains not with the absence of a definition of terrorism in international law but with the poor enforcement of the existing norms.

Thus, despite the obvious benefits of formulating a generally acceptable definition-political considerations- the international legal order can function fine without a definition. Law enforcement may be possible, perhaps less effective in terms of cooperation and co-ordination, yet possible, without a definition of terrorism. This does not imply that terrorism, as a term does not have strong political significance. This is the case because states act directly in reaction to terrorism. They act immediately on the basis of someone being considered a terrorist or something being considered terrorism. The

[100] Supra note 43, p. 42.

Security Council even requires them to do so by calling all states to prevent and suppress the financing of terrorist acts, deny safe haven to those who finance, plan, support or commit terrorist acts[101].

Moreover, the term 'terrorism' involves enormous power to change the cooperation of states at an international level. A state that is accused of being involved in terrorism may find itself politically isolated as well as for example economically damaged. As a matter of fact, it is precisely the absence of a legal definition that makes it possible to the hegemonic power and its followers to determine the international public enemy on a case-by-case basis. A legal definition of terrorism would serve as a limitation to this discretional power. Obviously by defining terrorism, it is possible to structure and control the use of a term that, historically, has been politically and ideologically abused. Rather than remaining an ambiguous term justifying all manner of repressive responses, legal definition would confine the term within known limits. An internationally agreed legal definition would of course not assure that state interests no longer influence states' decision to act or refrain from acting in reaction to terrorism. However, it would limit states' ability to pursue other purposes in the name of fighting terrorism.

[101] 2000 Terrorist Financing Convention.

CONCLUSION

The statement which Rosalyn Higgins and Maurice Flory wrote in their book entitled 'Terrorism and International Law' is still applicable: '*Everyone has his own idea of the notion of terrorism. The idea conjures up to the threat or use of violence outside of wartime and most usually against non-military targets, for the achievement of political end'*. The situation has not changed, even since 2001. Terrorism is a politically divisive subject and in the existing situation it may never be possible to arrive at a definition that will enjoy the approval of all the international community. According to Wilkinson, one of the central problems in defining terrorism lies with the subjective nature of terror[102]. We all have different thresholds of fear and our personal and cultural backgrounds make certain images and ideas more terrifying to each of us than to others. The whole problematique related to a definition of terrorism is its differentiation from closely related concepts involving acts of violence, such as political violence. Political violence may be discerned from terrorism to the extent that it does not aim in the creation of a state of terror.

Despite the recent Security Council Resolutions, which oblige States to disregard motive and other ideological considerations, especially 1373 (2001), such Resolutions are binding on account of their nature as Council resolutions and thus we cannot assess what the reactions of States really are[103]. In contrast, both the 1998 Terrorist Bombings and the 1999 Terrorist Financing Conventions are ratified by less than half the States in the world and this is perhaps an indication that the determinations found

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[102] Wilkinson, P., *Terrorism versus democracy: the liberal state response*, (Frank Cass Publishers, 2001).

[103] S.C. Res. 1566 (8 Oct. 2004), sponsored by Russia, following the incident at the Beslan school in October 2004, adopted a definition of terrorism as follows: '... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature'.

in recent Security Council resolutions are not shared among the members of the international community. Any definition contained in a binding instrument could not therefore include any of the contentious issues I have previously identified.

In fact the international community has found it very hard in the past to come up with a consensus on what exactly is meant by 'terrorism' due to ideological clashes between states. Amnesty International raised the definition issue in its comments on the draft Council of Europe Convention on the prevention of terrorism[104]. As adopted on 3 May 2005[105], the Convention requires states parties to criminalise provocation of and recruitment and training for terrorism. It does not however, include a precise definition of terrorism for the purpose of the treaty, thus effectively creating subsidiary offences while the primary offence of terrorism remains undefined.

Given the differences of view in key elements it is difficult to sustain that international terrorism is per se a discrete and identifiable international legal norm. However, the absence of a generally accepted definition does not leave a gap in the international legal order. Terrorism is now prohibited by other international legal norms irrespective of the existence of a definition. The major problem with the lack of definition lies with the poor enforcement of existing norms, rather than with the lack of a generic definition of terrorism[106].

Until a definition is formulated and this will take long time, international law is capable of providing guidance on the definition of terrorism but as it the case so often with international law states must be willing to follow. States however, adopt vague and ambiguous definitions purposely in order to justify

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[104] Council of Europe: Amnesty International's Preliminary Observations on the December 2004 Draft European Convention on the Prevention of Terrorism, AI Index IOR 061/002/2005.

[105] http://conventions.coe.int/Treaty/Commun/

[106] supra note 100.

measures not considered acceptable under different circumstances[107]. The importance of labelling someone as terrorist and the ability of states to selectively use the term-in accordance with their own interests- along with their freedom to define the term in accordance with their interests in domestic law triggers questions as to whether terrorism should be addressed by reference to other international norms. Following the events of September 11 the international community witnessed the emergence of a new counter-terrorism model which equates terrorism with an 'armed attack'. The extent to which the events of September 11 and the responses that followed altered our traditional understanding of terrorism as a criminal activity is the subject matter of the following chapter.

[107]UN Doc CCPR/CO/76 EGY, 2002, UN Doc CCPR/CO/75/NZL, 2002.

CHAPTER 3

USE OF FORCE AGAINST TERRORISM: UNILATERAL EXTERNAL MODEL

INTRODUCTION

On September 11, 2001, Al Qaeda terrorists attacked the World Trade Center in New York and the Pentagon in Washington D.C. using hijacked airliners. The attack of 11 September exceeded in its scale and effects any single act of terrorism that has been carried out to date. Indeed the effects of the attack in terms of both human casualties and material damage were horrendous and were easily comparable to a very substantial armed attack by conventional means. In the past acts of terrorism were often seen as involving relatively sporadic and small scale violence which fell short of the threshold necessary for the use of force in the context of self-defence, and were better left to be dealt with in the context of international criminal law. However, the events of September 11 challenged the predominant view that non-state terrorist attacks should be dealt within the framework of pre-September counter-terrorism models, i.e. domestic and international mechanisms that I had identified in chapter one of my thesis[1].

Shortly after the events of September 11 both the United States[i] and the United Kingdom notified the Security Council that they were conducting operations against the Taleban and Al Qaeda[2] pursuant to their right of individual and collective self-defence which permits the use of force in self-defence

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[1] For past instances see: Gray, C., *International law and the use of force,* (Oxford University Press, 2000), p. p 117-118. Also: Wedgwood R., Responding to terrorism: the strikes against Bin Laden, 24 *Yale Journal of International Law (1999)*, p. 559.

[2] See Alexander, Y., and Swetnam, M., Usama bin Laden's al-Qaeda: profile of a terrorist network, at 1 *Global Terrorism* (2001), p.105.

against an armed attack[3]. The military intervention[4] against Afghanistan, that took place as part of the 'war against terror' raised a number of issues regarding the precise parameters of the right to self-defence and the nature of its evolution. Additionally the United States National Security Strategy[5] challenged the traditionally accepted prohibition of the use of pre-emptive use of force.

In the present chapter I examine the application of the Jus ad bellum principles[6] in the case of terrorism by questioning whether, and if so, in what circumstances, states are entitled to resort to the use of force against terrorism under international law. Is there a new *unilateral external* model on the use of force against terrorism? If so, which are the parameters of such an emerging model?

With regards to the relevance of the Jus ad bellum principles to terrorism, I question whether terrorist acts could be seen as an armed attack under the Jus ad bellum so as to trigger the applicability of the Jus in bello. Is terrorism in general and terrorism of the scale and effect of September 11 in particular, an armed attack as to trigger the right of use of force under self-defence? Evidence that terrorist acts constitute an armed attack has come through Security Council Res. 1368 and has been supported by other organizations[7]. Security Council Resolution 1368 cited the 'inherent' right to self-defense in the specific context of international terrorism. Resolution 1368 however, is an exceptional case reserved

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[3] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946;

[4] For a full discussion of the legality of the post-September 11 responses, see: O'Connell, M, Lawful self-defence to terrorism, 3 *U.Pit. Law. Review* (2002). Also: Beard, J., America's new war on terror: the case for self-defence under international law, 25 *HJ L. Public Policy* (2002), p. 55. Also: Franck, T., Terrorism and the right of self-defence, 95 *AJIL (*2001), p.829. Also:O'Connell, M., Terrorism and self-defence, *Jurist,* Sept.18, (2001) (available at www.jurist.law.pit.edu/forum); Cassese, A., Terrorism is also disrupting some crucial legal categories of international law, 12 *EJIL (2001), p.p.* 993, 995-98. Also: Kelly, J., The man behind the terror, *Wash Post*, Sept. 27, (2001), p.12.

[5]United States National Security Strategy, 17 September 2002 available at www.whitehouse.gov/nsc/nss.pdf.

[6] The legality of the use of force under international law is referred to as the *'jus ad bellum'*, the rules governing when force can lawfully be used and is distinguished from the *'jus in bello'*, that encompasses the rules that apply once force has been used and a conflict is underway.

[7] NATO and the EU affirmed the right of self-defence. See relatively: Gray, C., Bush Doctrine, p.441.

for exceptional circumstances and if a similar incident took place the 1368 model would be followed again. Given the fact that terrorist acts *may* amount to armed attack, I further question whether anticipatory self-defence is applicable in the case of a qualifying terrorist attack and I argue against the existence of a pre-emptive use of force against terrorism. In any case though recourse to armed force against terrorism within the context of Articles 51 of the UN Charter fall under the suppressionist model. This is exemplified by the fact that the majority of States consents to the use of armed force against terrorism only where such an act has already taken place, and despite the existence of the US pre-emptive doctrine, which has increasingly found itself an implicit place in the preamble to recent Security Council resolutions, State practice in fact strongly demonstrates that pre-emptive strikes are not at all supported; instead, the suppression of terrorism is premised – at least in General Assembly resolutions and in the framework of bilateral and multilateral agreements – on increased forms of co-operation in the security and criminal fields[8].

In this quest, certain issues remain unanswered within the current use of force literature, and in particular, to what extent can the UN Charter framework circumscribe and relate to terrorist attacks, since Articles 51 and 42 were premised on inter-State use of armed force. If one is to argue that non-State actors are capable of launching an 'armed attack' within the meaning of Article 51 UN Charter, it is evident that one must by necessarily rethink foundational concepts, such as: a) what is thereafter the meaning of necessity and proportionality in response to the attack? b) has the requirement of an armed attack be attributed to a state been retained and which is the threshold for attribution? c) can a terrorist act cross the threshold of severity so as to trigger the application of Protocol II to the Geneva Conventions?

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[8] The last chapter of the present thesis focus exclusively on recent forms of co-operation.

Before turning to a discussion of the post-September use of force, it is useful to highlight several of the issues surrounding the use of force and the right of self-defense in international law generally. Thus, I have divided my chapter into two main sections. The first examines the traditional understanding of the use of force and the right of self-defence in international law, while the second part examines the possible evolution of an extended right of self-defence against attacks perpetrated by non-state actors (terrorists). Finally, the last part (part three) of the chapter discusses briefly the residual possibility of the application of Protocol II of the Geneva Conventions to terrorism.

PART ONE

1. THE USE OF FORCE IN INTERNATIONAL LAW UNDER ARTICLE 2(4) OF THE UN CHARTER[9]

The starting point for any discussion of the lawful resort to the use of force is the UN Charter and customary international law. The most important provision of the UN Charter on the recourse to force is Article 2(4) which although applicable only to UN member states, it now firmly represents customary law applicable even vis-à-vis third parties[10]. Article 2(6) of the UN Charter further supports the above view as it provides that the Organisation shall ensure that states which are not members act in accordance with the maintenance of international peace and security[11].

Article 2(4) provides that 'all member states are obliged to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations'[12]. It is immediately noticeable that Article 2(4) is not concerned merely with war in the technical sense but prohibits the use of force in general. The wording of Article 2(4) is unclear as to whether the prohibition applies only to armed force, or whether it extends also to other political or economic instances of coercive action[13]. It is

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[9] Art. 2(4) was determined as constituting jus cogens, whose breach was an international crime under draft Art. 19 of the ILC's Draft Rules on State Responsibility, although Art. 19 was deleted in the ILC's last reading in 2000. Crawford, J., Bodeau, P., and Peel, J., The ILC's draft articles on state responsibility: toward completion of a second reading, 94 *AJIL (*2000), p. 660.

[10] Nicaragua v. United States, Military and Paramilitary Activities in and against Nicaragua, Merits, ICJ Reports (1986), para.14. See also: Brownie, I., *International law*, (Oxford University Press, 2000) p. 87.

[11] Article 2(6) of the UN Charter.

[12] For a general discussion on the use of force under article 2(4) of the Charter see: Gray, C., *International law and the use of force*, (Oxford University Press, 2000), p.p. 25-26.

[13] The Declaration on Principles of International Law 1970 (G.A. Res. 2625) recalled the duty of States to refrain from any kind of force, while the same approach was underlined in the Charter of Economic Rights and Duties of States.

moreover unclear whether information warfare is encompassed within Article 2(4) UN Charter, and may thus constitute an instance of the use of force[14]. As is well known from the travaux preparatoires of Article 2(4), force is prohibited under this provision only where it is 'armed'. Strictly speaking, therefore, IW could never violate Article 2(4) because it lacks the possibility of an armed dimension. There is agreement, however, in recent literature that cyber war, at least in its form as an all-out attack, does indeed violate Article 2(4). There is also some consensus that there do exist certain areas within cyber war operations that do not constitute uses of force[15].

The question as to what constitute force[16] may be answered by reference to the preparatory works of the Dumbarton Oaks conference, where a Brazilian proposal that would have required states to refrain from economic or equivalent force was vehemently rejected by the other delegates[17]. The predominant view is therefore that Article 2(4) is limited to all instances of armed force, although there is a dispute with regard to the qualification posed by the second part of Article 2(4). Economic coercion may fall within the ambit of Article 2(7) or the rule against non-interference in the domestic affairs of other States[18]. This was moreover explicitly recognized in General Assembly resolutions 2131 and 2625, and was considered at length in the *Nicaragua case*[19]. The sole exception that has been identified in this regard was the Arab oil boycott of 1973/74.

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[14] See generally: Pottorff, J. P., *Information warfare: defining the legal response to an attack*, (US Naval War College, 1999).

[15] See: Bond, J. N., Peacetime foreign data manipulation as one aspect of offensive information warfare: questions of legality under the United Nations Charter article 2(4), (US Naval War College, 1996); Aldrich, R. W., How do you know you are at war in the information age, 22 *Houston J. Int'l L* (2000), p. 223.

[16] On the meaning of the term force generally see: Akehurst's *modern introduction to international law*, p. 311.

[17] Arend, J., and Beck, R. J., *International law and the use of force*, (Routledge, 1993), p. p. 33-37.

[18] Goodrich, L., Hambro, E., and Simons, A., *Charter of the United Nations*, (Columbia University Press, 3rd edition, 1969), p.49.

[19] Nicaragua Judgment, paras. 210-220.

Article 2(4) prohibits not only the use of armed force *per se*, but also all threats to employ such force[20], whether or not armed violence ultimately ensues[21]. Interestingly, in the *Nicaragua case*[22], the US military manoeuvres near the Nicaraguan borders were held not to constitute a threat of force, whereas when in 1994 'Iraqi tanks were deployed in positions pointing towards and within range of Kuwait' the UK representative to the Security Council was stated to be a breach of the provisions of the Charter[23]. The above cases demonstrate that the threat of force is not always made in overt terms, such as Noriega's declaration of war against the United States, and that sometimes threats do exist but are difficult to detect. It is evident that Article 2(4) refers only to an immediate threat of force taking place in the context of an inter-State dispute, such as when the UK and France gave Egypt an ultimatum of some hours to leave the Suez Canal Zone[24]. This threat was probably a breach of Article 2(4), but the term 'threat' would not probably cover the so-called U-2 incident of 1960[25].

It is now widely accepted that the prohibition of the use of force under article 2(4) of the UN Charter reflects customary international law[26], despite the fact that state practice has not always been consistent[27] with such a custom[28]. As it was stated in the Nicaragua case the rule against the use of force was a 'conspicuous example of a rule of international law having the character of *jus cogens*' [29].

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[20] Sadurska, R., Threats of force, 82 *AJIL* (1988), p.p. 239-268.

[21] In the context of the jus in bello, a declaration of war under common Art. 2 of the 1949 Geneva Conventions triggers the application of the Conventions. See: Green, L.C., *The contemporary law of armed conflict,* (Manchester University Press, 2nd edition, 2000), p. 73.

[22] Nicaragua Judgment para.227.

[23] Harris, D. J., *Cases and materials on international law* ,(Sweet and Maxwell, 5th edition, 1998), p. 864.

[24] Broms, B., Suez Canal, 12 *EPIL* (1990), p.p. 360-365.

[25] Ibid, p.241.

[26] ICJ Reports 1986, p.14.

[27] See: Nicaragua case, para, 186.

[28] See: Nicaragua case, para. 190. See also: Akehurst, M, *Custom as a source*, p. 53.

[29] Nicaragua, para. 103-04. See also: Jennings, R., and Watts, A., (eds.), *Oppenheim's international law*, (Essex: Longman, 1992). Also: Charney, J., Universal international law, 87 *AJIL* (1999), p.p. 539-541.

Thus, the mere fact that states in practice have not always refrained from the use of force this does not render the *jus cogens* norm invalid as objectors[30] cannot validly assert objections to *jus cogens* norms[31].

Although nominally outlawing most uses of force in international relations by individual States, the UN Charter does recognize a right of nations to use force for the purpose of self-defence. Thus the prohibition to use force against another state is not absolute in the sense that there are exceptions to the rule. The first exception, set forth in article 51 of the UN Charter, permits the use of force in self-defence. Under article 51 of the Charter: '*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*'. Thus, States victimized by an armed attack may not only defend themselves, but also receive assistance from others in mounting that defence. Moreover, they need not await a Council authorization to act, but are required to report actions taken to the Security Council, which may itself determine that it needs to respond in some fashion. Permissible self-defense is however, to be distinguished from reprisals, which are strictly prohibited under international law[32].

The second exception is to be found in article 39, which empowers the Security Council to determine the existence of a threat to the peace, breach of peace or act of aggression and decide what measures are necessary to maintain or restore international peace and security. By Article 42, the Council may turn to military force to resolve these situations in what are generally labelled enforcement operations. Therefore any lawful resort to the use of force should fall within one of the aforementioned categories.

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[30] This could constitute an act of aggression. See: UN GA res. 3314, article 1, 14 December 1974.

[31] Duffy, H., *The war on terror and the framework of international law*, (Cambridge University Press, 2006), p. 147.

[32] 1970 Friendly Relations Declaration. States that 'states have the duty to refrain from acts of reprisals involving the use of force. See: GA Res. 2625 'declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the charter of the United Nations 24 October 1970. See also: Bowett, D., Reprisals involving recourse to armed force, 66 *AJIL* (1972), p.p. 6-8.

An understanding of both those two exceptions is essential in order to assess not only the lawfulness of the military responses to the terrorist attack of September 11 but also the general application of article 2(4) and 51 of the UN Charter to terrorism.

2. USE OF FORCE IN SELF-DEFENCE[33]

Article 51 of the UN Charter makes reference to the 'inherent' right of self-defence. The reference to the 'inherent' right of self-defence indicates that the nature of the right cannot be impaired by post-Charter developments and it is thus reflects customary international law[34]. Thus, article 51 of the UN Charter and customary international law with regards to the use of force co-exist and customary international law supplements article 51.

A literal interpretation of article 51 provides in conjunction with Article 2(4) that resort to force in the exercise of individual or collective[35] self-defence may only be lawfully undertaken if an *armed attack* occurs against a member state of the United Nations. Thus, '*states do not have a right of armed response to acts which do not constitute an armed attack*'[36].

Although many attempts have taken place in order to define the factual circumstances in which a state may resort to force in self-defence, the UN Charter fails to provide a definition on *armed attack*. The question was examined in detail by the ICJ in the *Nicaragua case*, where the Court by relying on the 1974 Resolution on Aggression (Article 3), stated that an *armed attack* could include not merely action by regular armed forces, but also 'the sending by or on behalf of a state of armed bands, groups,

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[33] Schachter, O., The right of state to use armed force, 82 *Michigan Law Review* (1984).

[34] See: supra note 32, p. 150.

[35] The issue is relevant to situations were the use of force is employed by states which are not the direct victims of the attack. The Nicaragua case held that a state even if it is not the direct victim of the attack it can still act in self-defence provided that the direct victim requires assistance. See: Nicaragua case, para. 104-105.

[36] Quotation from the Nicaragua case, para. 110.

irregulars or mercenaries which carry out acts of armed force against another State'[37]. The decisive factor in determining whether the military action of a sponsored force could amount to an armed attack perpetrated by the sending State was found to rest on a 'scale and effects' test[38]. Therefore, it is the scale and effect of the activities of armed bands listed in the definition as 'acts of aggression' that will qualify them as armed attacks within the meaning of Article 51. The Court held that financing and equipping foreign paramilitaries does not constitute an armed attack, although the UK Judge Sir Robert Jennings and the US Judge, Stephen Schwebel vehemently objected from the majority on this point[39]. Only the most grave uses of force[40] will qualify as 'armed attacks' and thus trigger a victim state's right to respond with force in self-defense[41]. This finding that an 'armed attack' is required to trigger a state's right of self-defense was recently re-affirmed by the ICJ in *Case Concerning Oil Platforms* [42] and in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[43]. Specifically, in the *Oil Platforms* case, the World Court confirmed the criteria

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[37] Nicaragua Judgment, para. 195.

[38] Ibid, para. 194.

[39] The ICTY Appeals Chamber in its Judgment in the Tadic case rebuffed the 'effective control' test propounded by the ICJ in the Nicaragua case, which held that organised private individuals whose action is co-ordinated or supervised by a foreign State and to whom specific instructions are issued are considered de facto organs of the controlling State. The ICTY Appeals Chamber held that the ICJ's 'effective control' test was at variance with both judicial and State practice, and could only apply with regard to individuals or unorganised groups of individuals acting on behalf of third States, but was generally inapplicable to military or paramilitary groups. The ICTY's departure from the stringent 'effective control' test was duly replaced with an 'overall test' which simply requires co-ordinating or helping in a group's general military planning, besides equipping or possibly financing the group, in order to establish a relationship of agency between the group and the aiding State. Prosecutor v. Tadic, Appeals Judgment (15 July 1999), para. 109, 114.

[40] Ibid.

[41] Note that the ICJ went on to say that where a state is the victim of an attack which is not serious enough to amount to an 'armed attack', it is entitled to respond with 'proportionate countermeasures'. While the Court did not specify whether such countermeasures could involve the use of force, the better view is that they are limited to non-forcible measures. See: Crawford, J., *The International Law Commission's articles on state responsibility: introduction, text and commentaries* (Cambridge University Press, 2002), p. 283.

[42] Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Merits) [6 November 2003] ICJ <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm> at 20 July 2004.

[43] For a discussion of this decision see: Garwood-Gowers, A., Case concerning Oil Platforms (Islamic Republic of Iran v United States of America): did the ICJ miss the boat on the law on the use of force?' 5 *Melbourne Journal of International Law* (2004), p. 241. Also: Legal Consequences of the Construction of a Wall in the Occupied

for the use of force in self-defence — namely that an armed attack is a prerequisite, and that force used in self-defence must be necessary and proportionate[44]. More significantly, in determining whether the US had suffered an armed attack the Court applied the high threshold test from the *Nicaragua Case*. This test limits the notion of 'armed attack' to 'the most grave forms of the use of force'. In other words, not all uses of force are serious enough to constitute an armed attack triggering a state's right of self-defence. This was precisely the situation in the *Oil Platforms Case*, where the attacks on the *Sea Isle City* and the *Samuel B Roberts* were not considered sufficiently grave to amount to armed attacks against the US. As a result, the US did not have the right to respond with force in self-defence. The Court's confirmation of the test in the *Nicaragua Case* for an armed attack is significant because it maintains the high threshold at which a state's right of self-defence is triggered. Such a confirmation limits the freedom of states to claim that even minor incidents could amount to an armed attack triggering the right of self-defence.

The aforementioned high threshold of violence makes it particularly difficult for states to characterize terrorist acts as armed attacks. There are two major difficulties in doing so. The first concerns the gravity threshold for an 'armed attack', while the second relates to the attribution requirement. Prior to 9/11, few individual terrorist attacks were serious enough to meet the ICJ's high threshold for an 'armed attack'[45]. The majority of international terrorist acts consisted of relatively minor attacks on nationals abroad, rather than large-scale attacks on the actual territory of the victim state. It was therefore difficult to equate terrorist acts committed by non-state actors with conventional attacks by a

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Palestinian Territory (Advisory Opinion) [9 July 2004] *ICJ* available at: //www.icj-iij.org/icjwww/idocket/imwp/imwpframe.htm

[44] ibid.

45 For a detailed discussion of various views on how serious a terrorist attack needs to be in order to qualify as an 'armed attack', see: Arend, A., and Beck, R., *International law and the use of force: beyond the UN Charter paradigm*, (Routledge, 1993), p.p. 159-62.

state. As such, it was rare for an individual act of terrorism to qualify as an 'armed attack' triggering a victim state's right of self-defence.

Despite the fact that it is quite straightforward that the attacks of September 11 met the scale and effect threshold, due to the amount of victims and destruction caused by terrorist[46], not every instance of the use of force against a state is deemed to be an armed attack under Article 51. The several thousand people killed in the case of the terrorist acts of September 11, suggest that the actions could be deemed an armed attack under Article 51[47]. On the other hand, isolated or minor terrorist attacks should continue to be considered criminal acts, rather than 'armed attacks'[48]. In such circumstances, a victim state is limited to responding through law enforcement procedures, criminal justice mechanisms and other non-forcible measures[49]. Allowing the use of force in response to minor terrorist attacks would amount to the 'militarization of crime' and would severely undermine international law's general prohibition on the use of force[50]. Thus, the right of self-defence against terrorism remains subject to the gravity requirement.

One of the most controversial issues with regards to the right of self-defence relates to anticipatory self-defence. Is anticipatory self –defence is permitted and if so to what extent? Moreover, can the use of force by non-state actors trigger the lawful exercise of the right of self-defence by the victim state?

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[46] Nearly 3,000 innocents died in the attacks, which caused financial losses measured in the billions of dollars. See: United States Department of State, Patterns of Global Terrorism 2001, available at www.state.gov/s/ct/rls/pgtrpt/2001/pdf/ (Global Terrorism).

[47] Delbriick, J., The fight against global terrorism: self-defence or collective security as international police action? Some comments on the international legal implications of the 'war against terrorism', 44 *German Yearbook of International Law* (2001), p.p. 9-24.

[48] Ulfstein, G., Terrorism and the use of force, 34 *Security Dialogue* (2003), p.163.

[49]Note that some authors have argued that there is an emerging customary international law right of self-defense that permits states to use force in response to attacks that fall short of an 'armed attack'. See: Meessen, K., Unilateral recourse to military force against terrorist attacks, 28 *Yale Journal of International Law* (2003), p.p. 341, 353.

[50] Garwood-Gowers, A., Self-defence against terrorism in the post 9/11 world, 4 *QUT Law and Justice Journal,* (2004).

2.1. ANTICIPATORY SELF-DEFENCE

The major area of controversy surrounding the use of self-defence concerns so-called anticipatory self-defence, which is the use of force lawfully employed before an armed attack has occurred or to prevent a future attack[51]. No international tribunal has yet considered the matter and in the *Nicaragua case* the ICJ noted that the issue had not been raised and therefore declined from discussing it[52].

According to the wording of article 51 of the UN Charter an armed attack must have taken place already for the right of self-defence to be triggered. Unlike article 2(4), which makes reference to threats of violence, article 51 contains no threats of violence. There are currently two opposing schools of thought with regards to the right of anticipatory self-defence[53]. The legitimacy of anticipatory self-defence has been maintained by those who contend that Article 51 safeguards rather than restricts the customary right of self-defence[54], while the opposite camp supports a restrictionist approach[55]. Thus, those that argue in favour of the right of anticipatory self-defence suggest that the right of anticipatory self-defence under customary international law goes far beyond the UN charter. The main question is whether the customary right of self-defence, which appears to include a limited right of anticipatory self-defence[56] survived the introduction of article 51, which is clearly worded to the contrary.

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[51] See: Bothe, M., Terrorism and the legality of pre-emptive force, 14 *EJIL (*2003), p.228.

[52] Nicaragua Judgment, para. 195.

[53] See: Myjer, E., and White, N., The twin towers attack: an unlimited right to self-defence, 7 *Journal of Conflict and Security Law* (2002), p. 5.

[54] See relatively: Bowett, D. W., *Self-defence in international law*, (Manchester University Press, 1958). See also: Travalio,G. M., Terrorism, international law and the use of military force, 18 *Wisconsin International Law Journal (*2000), p. 149.

[55] Brownlie, I., in Cassesse, A., (ed), *The current legal regulation of the use of force*, (Martinus Nijhoff, 1986), p.p. 498-499.

[56] Caroline case.

Despite the wording of Article 51 to the contrary, some argue that customary law contains no such armed attack requirement[57] and that anticipatory self-defence against an imminent threat is permissible. The language of the *Caroline* case[58] has been widely quoted as establishing, and at the same time strictly limiting, those circumstances in which the use of self-defence in anticipation of an attack might be permissible. According to US Secretary of State, Daniel Webster, in the *Caroline case* in 1841, force is permissible '*only where it can be shown that there exists a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation' and 'the action taken must not be unreasonable or excessive and it must be limited by that necessity and kept clearly within it'.* The Caroline principles of necessity and proportionality were further enunciated in the *Nicaragua case*[59]. The Caroline case distinguishes between a real and immediate threats of armed attack and a potential or speculative risk thereof, while the immediate threat and not a speculative one. It follows thus, that the capacity to inflict harm however grave is insufficient, unless it is clear that there are indications of real and imminent threat to carry out an armed attack. Following such an observation it is arguable that the sole existence of weapons of mass destruction is not per se sufficient to justify the use of force under self-defence, since in itself it does not pose an imminent threat.

There is no sufficient state practice since the introduction of the UN Charter to suggest that there is indeed a customary norm as in reality, States avoid invoking anticipatory self-defence as the sole justification of armed violence[60], although Israel did exactly that after it had bombed an Iraqi nuclear plant in 1981[61]. However, the Security Council unanimously condemned Israel's actions[62]. Whether

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[57] Ibid. Also: supra note 54, Travalio, G., p. 145.

[58] See relatively: Higgins R., *Problems and process: international law and how we use it,* (Oxford University Press, 1994), p.242.

[59] Nicaragua Judgment, para.176.

[60] See relatively: Gray, C., *International law*, (Oxford University Press, 2000), p.112. Also: Pausta, J., Legal responses to international terrorism, 22 *Houston Journal of International Law* (1999), p.17.

[61] ibid.

one agrees with the application of the doctrine of anticipatory self-defence, there have been cases, such as the mass movement of Iraqi troops along the Kuwaiti border in 1990 and information available to the UK of an imminent Argentinean invasion of the Falklands, where the victim State refrained from pre-empting the initial attack[63]. It can be said that the majority of states are reluctant to accept the right of anticipatory self-defence[64]. At the same time, in a nuclear age where it cannot be required for a State to passively accept its fate before it can defend itself, the wide interpretation of the contemporary right of self-defence seems to be a pragmatic choice that is bound to be reasserted in the future. Numerous commentators assert that in certain circumstances it is illogical or unreasonable to require states to wait until an 'armed attack' has occurred to defend themselves[65]. State practice and existing norms of international law points towards the conclusion that 'anticipatory self-defence is normally unlawful but it is not necessarily unlawful in all circumstances[66]. The continuous existence of customary international law[67] along with article 51 of the UN Charter suggests that the right of anticipatory self-defence exists but is limited by the requirements of a real and immediate threat (Caroline case). Thus the applicable test in a particular situation is the indication of a real and imminent threat (as opposed to potential threat) to carry out an armed attack. Suffice it to say that even if one accepts the legality of anticipatory self-defense within the strict limits of *Caroline*, this would preclude action against States

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[62] SC Res. 487 (1981) 19 June 1981, UN Doc. S/Res/487, 1981.

[63] Arendt and Beck, supra note 17, p. 45.

[64] Greenwood, C., International law and the pre-emptive use of force: Afghanistan, Al-Qaeda and Iraq, 7 *San Diego International Law Journal* (2003). Also: Myjet, E., and White, N., The twin towers attack: an unlimited right to self-defence? 7 *Journal of Conflict and Security Law* (2002), p.5.

[65] See: Schachter, O., The right of states, 16 *Michigan Law Review*, (1984). See also: Warriner, F., The unilateral use of coercion under international law: a legal analysis of the United States raid on Libya on April 14, 1986, 37 *Naval Law Review* (1988), p. 58. Also: Franck, T., When, if ever, may states deploy military force without prior Security Council authorization? 5 *Wash. Univ. J.L.and Pol'y (2003)* p.p. 59-60, who notes in this respect that it may be necessary to respond to 'challenging transformations' such as increased weapons capability.

[66] Oppenheim's international law, p. 421.

[67] See: supra note 59, p. 242.

which posed potential threats, even if this involved the development of a strategic capability of weapons of mass destruction, unless it could be credibly shown that an attack was imminent.

2.2. USE OF FORCE BY NON-STATE ACTORS PRE-SEPTEMBER 11

The fact that international law is traditionally perceived as regulating the relations between states rather than individuals as opposes to national laws which regulate the relationships between individuals and the state, poses another further controversy with regards to the scope and application of article 51 of the UN Charter. Does a state need to be responsible for the attack for the right of self-defence to be triggered or does the right of self-defence arise even where a non-state actors is responsible for the attack[68]?

The UN Charter was constructed around the immediate post-WW II security notion that only States were capable of employing force against other States. Thus anything else was seen as an internal affair that could be handled through the medium of domestic criminal law, or, where it possessed a transnational element, through inter-State criminal cooperation. Terrorism, an immature and unformed concept at the time, fitted that mould.

Although Article 51 does not explicitly state that an 'armed attack' must be committed by a state, the Charter framework was intended to govern relations between states and hence, the traditional assumption was that such attacks had to emanate from a state. However, this has never meant that an

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[68] See: Murphy, S. D., Contemporary practice of the is relating the international law contemporary practice, 96 *AJIL* (2002), p. 237.

'armed attack' could only be carried out by the regular armed forces of a state. Even before the Charter, the *Caroline* case of 1837, which set down the customary law of self-defence, indicated that the law acknowledges the right of self-defence in response to force employed by non-state actors[69].

Before the September 11 the predominant view was that self-defence in order to be justified, acts of individuals or groups must be attributed to the state. The ICJ further suggested that 'the nature of the acts which can be treated as armed attack covers both action by regular military armed forces but also the sending by or on behalf of the state of armed groups, bands etc[70]. Thus, the ICJ judgment in *Nicaragua*[71], appear to assume that a state must be involved in the armed attack. Consistent with this, numerous writers specifically assert that state involvement is necessary[72], and that, for self- defence to be justified, acts of individuals or groups must be imputed to the state, in accordance with state responsibility. Following from this, it has been suggested that coercive action directed against a state without any responsibility for an existing or imminent attack could constitute an international wrong against that state. The attacks of September 11, which were perpetrated by a terrorist organization and the military responses that followed, indicated a different view of the law as accepting that the self-defence is triggered by attacks of non-state actors[73]. Despite such reference to the right of self-defence the ICJ in the Palestinian Wall case, reaffirmed the view that article 51 of the Charter requires state involvement in the attack in order for the right of self-defence to be triggered. Judge Higgins opposed

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[69] See: Reisman, M., International legal responses to terrorism, 22 *Houston Journal of International Law* (1999), p. 46.

[70] Para. 195.

[71] The ICJ appeared to assume state involvement in the armed attack when it found there to be broad agreement that the 'nature of the acts which can be treated as constituting armed attacks' covers both 'action by regular military armed forces but also 'the sending by or on behalf of a state of armed bands, groups' Nicaragua, para. 195.

[72] See, for example, Antonio Cassese who notes that unless the attack is imputable to the State and becomes a 'state act' then 'there can be no question of a forcible response to it.'

[73] See relatively: Jinks, D., State responsibility for violations of international humanitarian law, 84 *Chicago Journal of International Law* (2002), p. 83.

the approach of the court suggesting that article 51 of the UN Charter does not limit the exercise of the right of self-defence to attacks originating from the state[74]. The court's approach still provokes reflections on whether international law recognises the right of self-defence only if the attack originates from the state[75]. If we accept that as the law stands requires some state involvement in the attack[76], the question posed is when a non-state actor becomes attributed to the state?

Prior to 9/11, the test for attribution required a high degree of co-operation between a state and a non-state actor[77]. According to the 'effective control' test applied by the ICJ in the *Nicaragua Case*, the conduct of a non-state actor is only attributable to a state if the state has 'effective control' over the specific conduct of that non-state actor. A general relationship of control and dependence involving the provision of weapons or logistical support for non-state actors is not sufficient[78]. Although a less stringent test - that of 'overall control- was applied by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadic*, that case concerned individual criminal responsibility and the application of international humanitarian law, rather than state responsibility[79]. Given that Article 8 of the *Articles on Responsibility of States for Internationally Wrongful Acts* incorporates an approach that is similar to the 'effective control' test, it is suggested that this higher threshold continued to be the applicable standard prior to 9/11.

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[74] See: Separate opinion of Judge Higgins, para.33-34. See also: the ICJ Advisory Opinion on the Israel security Fence and the limits of self-defence, 99 *AJIL* (2005), p.p.57-59. Also: Murphy, Self-defence and the Israeli Wall Advisory Opinion: an Ipse Dixit from the ICJ? 99 *AJIL* (2005), p. p. 62-76.

[75]See: Legal Consequences of the Construction of a Wall in the occupied Palestinian territory, Advisory Opinion, 9 July 2004, para. 139.

[76] Judge Higgins, para. 33.

[77] For a detailed study of this question see generally: Jinks, D., State responsibility for the acts of private armed groups, 4 *Chicago Journal of International Law* (2003), p. *83.*

[78] On state responsibility and terrorist activity see generally: Condorelli, L., The imputability to states of acts of international terrorism, 19 *Israel Yearbook on Human Rights* (1989), p. 233.

[79] Supra note 52.

A state is not usually considered responsible for acts performed by individuals who are not in the service of that state. Nevertheless, there may be instances in which a state ought to be identified with actions carried out by certain groups, even when the latter are not formally affiliated to the state concerned. The question here is what type and level of control over such individuals or groups must a state have in order for them to be deemed to represent that state, with the result that the state is held responsible for their actions under international law. In Article 8 of its draft provisions relating to state responsibility (3 August 2001), the UN International Law Commission (ILC) proposed that the condition for state responsibility for the acts of groups of persons is that these groups are acting under the 'instruction', 'direction' or 'control' of the state in carrying out the acts concerned[80].

The military intervention in Afghanistan seems to challenge the traditional views on state responsibility. In part two of the chapter I will discuss the post-September use of force in order to demonstrate the paradigmatic shift of the international community's views with regards to the issue of state responsibility.

3. NECESSITY AND PROPORTIONALITY IN THE USE OF FORCE

The *Caroline* case standard requirements of legitimate self-defence[81] have now matured into the principles of necessity and proportionality[82]. Necessity requires that the resort to force occur only

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[80] International Law Commission, 2001 p. 104. For the principles of attribution see International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53rd sess, UN Doc A/55/10, (2001) at *http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf*SeeNicaragua Case [1986] ICJ Rep 14 [109]-[110], [115]. A similar test is included in Article 8 of the International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53rd sess, UN Doc A/55/10 (2001): The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[81] See: Dinstein, Y., *War, aggression and self-defence*, (Oxford University Press, 2000), p. 205.

when no reasonable other options remain to terminate continuation of the armed attack[83]. As the *Caroline* case shows, necessity may imply a degree of immediacy. While an immediate response may not be an effective response, the longer the time lapse, the more tenuous the argument becomes as to the urgent necessity of unilateral action.

Proportionality requires that defensive responses be limited to those actions necessary to defeat the armed attack[84]. Therefore the right of self-defence is limited by the requirement that the force used not exceed the necessary to viably repel the attack and defeat the aggressor. It follows from the necessity (and proportionality) test, that self-defence can only be justified where the targets of defensive action are clearly identified, such that their contribution to the threat in question can be properly assessed. It is unlikely that having achieved these aims, the principle allows the victim State the right to take preventive action for the future, as this would justify the perpetual existence of the conflict, would most definitely violate territorial sovereignty and would threaten international peace and security[85]. If we accept this latter statement, it logically follows that whereas the size of the response must be proportionate to the prior attack, the nature and consequences need not be. This is the only logical conclusion one can deduce from the ICJ's Advisory Opinion in the *Nuclear Weapons* Opinion, where it stated that 'the proportionality principle may … not in itself exclude the use of nuclear weapons in self-defence in all circumstances[86].

In conclusion it can be said that the use of force is lawful when it meets the criteria of necessity and proportionality and only when the targets have been identified. Thus, the right to use force under self-

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[82] Letter from Daniel Webster to Lord Ashburton (6 Aug. 1842), reprinted in 29 *BFSP* (1840-41), pp. 1129, 1138.For more on proportionality see: Gardam, J. G., Proportionality as a restraint on the use of force, *20 Australian Year Book of International Law* (1999), p. *161.*

[83] Supra note 82, p. 205.

[84] ICJ Nicaragua, para 176.

[85] Supra note 32, p. 162.

[86] Legality of the Threat or Use of Force of Nuclear Weapons, Advisory Opinion, *ICJ* Reports (1996), para. 42.

defence is not automatically justified since an appraisal must be made, in the light of any given situation of the necessity and effectiveness of the measures proposed to counter that threat and whether the measures proposed are proportionate to such a threat.

4. THE SCOPE OF INDIVIDUAL AND COLLECTIVE SELF-DEFENCE

The fact that the use of force is justified under international law article 51 of the UN Charter is controversial with regards to the scope of collective and individual self-defence[87]. Does the UN Charter allows only the collective exercise of individual self-defence or it allows other states whose interest are not affected to support the victim state in its exercise of self-defence? The issue is of particular relevance to the legitimacy of the use of force by states, which are not affected by the armed attack in the sense that they were not the direct victims of the attack[88].

According to the Nicaragua case 'states interests need not be directly affected in order to exercise collective self-defence, provided the injured state requests assistance'[89]. Such requests were made by Kuwait and Saudi Arabia to the United States and its allies in august 1990 following the invasion and occupation of Kuwait by Iraq[90]. The majority of the commentators agree on the fact that collective self-defence requires that the state has been requested to intervene by the victim state[91]. As I previously mentioned the issue is of particular relevance with regards to the legitimacy of military force employed

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[87] Delbruck, Collective self-defence, *EPIL*, (1992), p.p. 656-659.

[88] See: Evans, M., *International Law*, (Oxford University Press 2000), p.605.

[89] See: Nicaragua, para. 104-105.

[90] See: Akerhust, M., *Modern introduction to international law*, (HarperCollins, 1982), p. 319.

[91] Supra note 61, Gray , C, p. 139.

by states, which were not the direct victims of the attack. In the military action against Afghanistan the US received the assistance of the UK, which was not the direct victim of the attack of September 11. The collective nature of the right of self-defence is reflected in various treaties such as the NATO[92] and the Inter-American treaty of reciprocal assistance[93], which obliges states to assist the parties attacked, if these actions are deemed necessary. Such regional treaties indicate that the right of collective self-defence should be exercised if only a request by the state under attack has been made.

5. USE OF FORCE AUTHORISED BY THE SECURITY COUNCIL

In situations where the use of force in self-defence is not justified the only legitimate use of force is the one authorised by the Security Council. Under chapter VII of the UN charter, the Security Council has the power to assess a specific situation and take appropriate measures to resolve the situation, including the use of force[94]. Under article 42 the Security Council has the ultimate power to authorise the use of force, when all other non-coercive measures have been inadequate[95]. Despite such ultimate power to authorize coercive measures[96] for the restoration of peace and security, the Council's power is limited by the Charter itself. Under article 42 of the charter the Security Council can authorize the use of force only when it considers that the measures adopted are necessary to maintain the international peace and

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[92] See: North Atlantic Treaty, article 5. 34 *UNTS* 243.

[93] See: Inter-American Treaty of Reciprocal assistance, Rio de Janeiro, 2 September 1947, 21 *UNTS* 324, Article 3(1).

[94] For a relevant discussion on the powers of the Security Council see: Santori, V., The UN Security Council interpretation of the notion of the threat to peace in counter-terrorism, in Nesi, G., *International co-operation in counter-terrorism: the United Nations and regional organisations in the fight against terrorism,* (Ashgate, 2006).

[95] Such authorisation took place in Somalia (1992-1993), Rwanda (1994), East Timor (1999). See relatively: Chesterman, S., *Just war or just peace. Humanitarian intervention and international law*, (Oxford University Press, 2001), p. 123.

[96] See: SC Res. 841, 1993, SC Res. 232, 1966, SC Res. 794, 1992, SC Res. 713, 1991.

security. Recently adopted resolutions of the Security Council, such as the 1368 and 1373 which condemned terrorist attacks as a threat to international peace and security and resolution 1530 following the bombing in Madrid suggest that any act of international terrorism amount to a threat to peace and security and it falls within the situations where the Security Council may authorize the use of force under 41 of the Charter.

Such threats to the international peace and security do not constitute alone the sole justification for coercive measures to be authorized by the Council. It is primarily the role of the Council to assess the situation and determine that non-coercive actions are adequate to resolve the issue. What is important is the obligation on states not to give the Council a first opportunity to authorize force, before themselves proceed unilaterally, but to refrain from the use of force unless or until such authorization is achieved. In order words the Council authorization is a sine qua non for the legitimate use of force other than in self-defence.

As I have mentioned already the Security Council promptly characterized the attacks of September 11 as a threat to international peace and security. It also expressed in resolution 1386 its readiness to take all necessary measures to address such threats in accordance with its responsibilities under the Charter of the United Nations. The role however, of the Security Council as an international police was largely undermined by the military intervention in Afghanistan, which was unilaterally initiated. The unilateral action in the case of Afghanistan illustrates the existing confusion between self-defence and collective action under the Charter and it demonstrated the lack of a comprehensive classification of the relationship between the exercise of unilateral use of force and the application of the collective security system.

PART TWO

1. SHIFTING OF APPROACHES FOLLOWING 9/11[97]

Prior to 9/11 there had existed no precedent whereby the Security Council had authorised the use of force against States that were suspected of directly supporting acts of terrorism[98]. Moreover, with the exception of Israel, no other country had employed armed force against non-State actors. This statement, however, deserves a notable qualification; in that it was not infrequent before 9/11 for US criminal enforcement authorities to illegally – at least as the principle of territorial sovereignty is concerned – abduct persons suspected of having been involved in terrorism, as well as other offences[99]. In all such instances, a terrorist act had indeed taken place, but it could not be equated to an armed attack, and in any event the retaliatory action by the United States was seen as police enforcement, rather than action predicated on the inherent right of self-defence under Article 51 UN Charter. Similarly, even in the case of State-sponsors of terrorism, the Security Council went only as far as adopting sanctions, but these were premised on Article 41 UN Charter (measures falling below the use of armed force) and thus did not involve the use of armed force. Hence, it is evident that prior to 9/11

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[97] For discussion of this issue see: Byers, M., Terrorism, the use of force and international law after 11 September, 51 *International and Comparative Law Quarterly* (2002), *p.* 401, Beard, J. M., Military action against terrorists under international law: America's new war on terror , 25 *Harvard Journal of Law and Public Policy* (2002), p. 559; Stahn, C., Terrorist attacks as armed attack: the right to self-defense, article 51(1/2) of the UN Charter, and international terrorism, 27(2) *Fletcher Forum of World Affairs* (2003), p.35; Arai-Takahashi, Y., Shifting boundaries of the right of self-defence - appraising the impact of the September 11 attacks on Jus Ad Bellum, 36 *International Lawyer* (2002), p. 1081. Also see: Paust, J., Use of armed force against terrorists in Afghanistan, Iraq and beyond, 35 *Cornell JIL* (2002), p.534. Also: Wedgwood, R., Responding to terrorism: the strikes against Bin Laden, 24 *Yale JIL* (1999), p. 564.

[98] SC Res. 748 (31 March 1992); SC Res. 1044 (31 Jan. 1996).

[99] United States v. Yunis, 924 F.2d 1086 (DC Cir. 1991).

we do not possess a model of force against terrorist attacks[100], much in the same way that we lack a model of what constitutes terrorist use of force under Article 2(4) UN Charter.

Following the events of 9/11, the Security Council was prompt in adopting Resolution 1368[101]. There has been some debate on what this resolution actually postulated, but it is clear that all Council members viewed the events of 9/11 as a series of acts that are akin to the concept of 'armed attack' under Article 51 UN Charter[102]. This was implicitly affirmed in its preamble affirmation recognising the inherent right of individual or collective self-defence. Despite our juxtaposition of the 'clear' view of the Council that 9/11 was an act akin to armed attack and the implicitness in its affirmation; this is not atypical of Security Council resolution language. For the first time, a Council resolution affirms that terrorist acts, although of considerable scale in this case, 'is a threat to international peace and security', the corollary of which is the further confirmation of the 'inherent right of individual self-defence'. Both the affirmation and the confirmation in the last sentence employ language that has been lifted verbatim from Article 51 and Chapter VII of the UN Charter. This seemingly innocuous use of terminology is revolutionary at best, because it signals the fall of the pre-9/11 model that I discussed in my previous sections, whereby I demonstrated that the UN Charter framework was designed not to encompass terrorist force, but also that the practical implications of such a venture (had it been fitted in the Charter) were impracticable.

However, the fact that resolution 1368 is a context specific instrument – i.e. adopted in relation to 9/11 alone – we can ascertain that although the link between the UN Charter's use of force provisions and terrorism is a new and real approach (as linked in Resolution 1368), it is wholly unclear whether other

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[100] Israel and USA have since the early 1980's argued that terrorist attacks justify the use of force for defensive purposes. See Israeli claim of pre-emptive self-defence regarding the interception of a Libyan civil aircraft in 1986, UN Doc. S/PV2655/Corr.1 (18 Feb. 1986), and US Presidential Directives 62 (22 May 1998) and 63 (22 May 1998).

[101] SC Res. 1368 (12 Sep. 2001), UN Doc. S/RES/1369, 2001, Para. 1.

[102] Murphy, supra note 26.

terrorist acts can ever be quantified as constituting armed attacks. Moreover, if on the basis of Resolution 1368 the terrorist force employed in the events of 9/11 amounts to a benchmark of armed force that is tantamount to an armed attack, we are in the dark as regards the following issues: a) whether the benchmark is in fact too high and could thus cover terrorist attacks of a lower intensity, and; b) what is the appropriate action under both Articles 51 and 42 UN Charter. We should, therefore, be cautious about the long-term effects of this resolution and must by necessity wait for a similar one in order to assess what kind of precedent has been created.

If Resolution 1368 is to become a precedent model, despite its vagueness and uncertainty, one must furnish evidence that there exists significant international support granting the right to individual and collective self-defence in other future cases where a terrorist act is imminent or has taken place. It must also be noted that Resolutions 1368 and 1373 have so far been the only resolutions asserting the right to self-defence in response to terrorist activities. On all other more recent occasions (e.g. the attacks in Bali, Madrid or Beslan), the Council has vigorously condemned the terrorist attacks, describing them as threats to international peace and security, yet remaining silent on the possible invocation of the right to self-defence, despite the fact that many of these attacks were undoubtedly of sufficient gravity in order to amount to 'armed attacks'. Therefore, the present author contend that Resolutions 1368 and 1373 should not be read as a blank authorization for an all-out war on international terrorism.

2. STATE PRACTICE POST-SEPTEMBER 11

Following 9/11 the US President formally proclaimed a national emergency[103] and Congress passed a joint resolution that authorised the President to '*use all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons*'[104]. Moreover, the President described the attacks as 'an act of war against the US'[105]. In notifying the Security Council that it was acting in individual and collective self-defence, the US asserted that 'it had clear and compelling information that Al-Qaeda organisation, which is supported by the Taleban regime in Afghanistan, had a central role in the attacks' and that there was an 'ongoing threat' made possible 'by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to by used by [Al-Qaeda] as a base of operations[106].

On 7 October 2001 and shortly after the US government declared a 'war against terror', the US and its allies undertook military action against Afghanistan, *as a response to the events of September 11*[107] *and in accordance with the inherent right of individual and collective self-defence'*. The objective of the campaign against Afghanistan was to attack the base of Al-Qaeda and to compel the Taleban regime to hand over members of the terrorist organization, which was responsible for the atrocities of 9/11[108]. Al

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[103] Proclamation No. 7463, 66 Federal Register 48, 199 (18 Sep. 2001).

[104] Authorisation for Use of Military Force, Public Law No. 107-40, 115 Stat. 224 (2001).

[105] Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, in 37 Weekly Compilation of Presidential Documents 1347, 1347 (20 Sep. 2001).

[106] Letter from the Permanent Representative of the USA to the United Nations, Addressed to the President of the Security Council, UN Doc. S/2001/946 (7 Oct. 2001), available at: http://www.un.int/usa/s-2001-946.htm

[107] See: www.un.int.usa/s-2001-946.htm.

[108] See: www. Operations.mod.uk/veritas/faq/objectives.htm. The UK expressed the same views in its Letter to the Security Council following its alliance with the USA in the Afghan conflict. See: Letter from the Charge d'

Qaeda is an organization that had allegedly been involved in many previous operations such as the 1993 World Trade centre bombing, the 1998 bombings of the US embassies in Kenya and Tanzania and had also claimed responsibility for the 1993 attack on US special forces in Somalia, as well as three separate 1992 bombings intended to kill US military personnel in Yemen[109]. Evidence suggests that the military action pursued by the USA received consensus across the globe. Moreover, NATO's North Atlantic Council announced that if the attacks originated from outside the United States, they would be 'regarded as an action covered by Article 5 of the Washington Treaty'[110]. Article 5, based on Article 51 of the UN Charter, provides for collective self-defence if any of the member States suffers an armed attack. Upon finding that the attacks were perpetrated by foreign terrorists, and thereby invoking Article 5 of the NATO Treaty[111], NATO made no mention as to who would be the target of self-defence. No doubt, such an omission provided significant latitude in attacking both a non-State and a State entity, but it is devoid of stable normative content, since it is premised on vague and ad hoc considerations. Nonetheless, it demonstrates significant support for military action following a high-intensity terrorist attack. Similarly, the Organisation of American States (OAS) invoked the self-defence provisions of the Rio Treaty[112], having first ascertained that the terrorist attacks of 9/11 were attacks against all American States[113]. Likewise, Australia invoked Article IV of the ANZUS Treaty in

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Affaires of the Permanent Mission of the UK to the United Nations, Addressed to the President of the Security Council (7 October 2001), available at: http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=328.

[109] See relatively: Gus, M., *Understanding terrorism: challenges, perspectives and issues*, (Sage Publications, 2003), p.p.194-195.

[110] Statement by the North Atlantic Council, NATO Press Release No. 124/2001 (12 Sep. 2001), available at: http://www.nato.int/docu/pr/2001/p01-124e.htm. See also: Daley, S, For first time, NATO invokes joint defence pact with US, *New York Times*, 13 September 2001. p.17.

[111] Statement by the NATO Secretary-General, Lord Robertson (2 Oct. 2001), available at: http://www.nato.int/docu/speech/2001/s011002a.htm

[112] 1947 Inter-American Treaty of Reciprocal Assistance, Art. 3(1), 21 UNTS 77. See: Ratner, S. R., Jus ad Bellum and Jus in Bello after September 11th, 96 *AJIL* (2002), p.p. 905-921. Also: Reisman, W. M., Assessing claims to revise the laws of war, 97 *AJIL* (2000), p.p. 82-90.

[113] Terrorist Threats to the Americas, Resolution 1, 24th Meeting of Consultation of Ministers of Foreign Affairs

agreeing to take part in the Afghan campaign on the side of US-led coalition[114]. Despite the fact that the military intervention was initiated by the US and the UK, the international community demonstrated its condemnation of the attacks by supporting the campaign by offering logistic assistance. For example Russia, China and India agreed to share intelligence, others offered logistics support, while twenty-seven nations granted over-flight and landing rights and 46 multilateral declarations of support were obtained[115]. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taleban, and Pakistan agreed to cooperate fully with the United States campaign[116]. Twenty-seven nations granted over flight and landing rights and 46 multilateral declarations of support were obtained[117], while Australia, Canada, the Czech Republic, Germany, Italy, Japan[118], the Netherlands, New Zealand, Turkey and the United Kingdom offered ground troops[119]. Even states like Malaysia, which opposed the use of military force on political grounds, recognised that such force was 'a legitimate course of action as an act of self-defence'[120]. The unanimous international support of the use of force[121] in the case of Afghanistan is relevant to the

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Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (21 Sep. 2001).

[114] Prime Minister John Howard, Government Invokes ANZUS Treaty – Press Conference (14 Sep. 2001), available at: http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml

[115] Schmitt, M. N, *Counter-Terrorism and the Use of Force in International Law*, George Marshall European Centre for Security Studies Paper No. 5 (2002), p. 10; see also, Murphy, S. D, Contemporary Practice of the United States Relating to International Law, 96 *AJIL* 2002, p. 237.

[116] White House Website, *News Releases for September 2001* (2001) <http://www.whitehouse.gov/news/releases/2001/09/> at 20 July 2004.

[117] Murphy, S. D., Terrorism and the concept of armed attack. In Article 51 of the UN Charter 43 *Harvard International Law Journal* (2002), p.41. Also: Murphy, S. D., Contemporary practice of the United States relating to international law, 96 *AJIL* (2002), p.237.

[118] ibid.

[119] ibid.

[120] ibid

[121] See 56 UN SCOR, 4414th mtg, UN Doc S/PV.4414 (2001). Iran, Iraq and Malaysia were among the small number of states that opposed the use of force in Afghanistan.

extent that it can influence responses to similar future situations. Despite the fact that one incident alone cannot change the legal regime regarding the lawful use of force, the events that took place may have an impact in the future on the way states address and respond to terrorism.

3. USE OF FORCE BY NON-STATE ACTORS POST-SEPTEMBER 11

As I already indicated in previous sections self-defence is justified in case there is an attack by a state against another state. However, the attacks of September 11 were perpetrated by a non –state actor. This triggers the question as to whether a non-state actor and in particular a terrorist organization once responsible for an attack can be the subject against whom use of force in self-defence might by employed. And if so, who is going to be the subject of such an attack? The military intervention of Afghanistan revealed the confusion regarding the issues of state responsibility. From a practical point of view, it is unlikely that a terrorist organization may be based on the territory of a particular country without the connivance of the latter, except where it may be shown that the terrorist organization has forcefully occupied part of the country's territory without its consent, and a struggle is being waged to free that territory. Few examples spring to mind, but they are poignant: the first is that of *Abu Sayaf*, a branch of Al-Qaeda based in remote Muslim majority islands in the Philippine archipelago, and secondly Al-Qaeda cells and major operatives in lawless Somalia. Whereas in the case of Al-Qaeda/Afghanistan-type terrorist attacks against a State, the acts of the terrorist group can be directly, negligently or through tacit acquiescence attributed to the State wherein the terrorists are harboured,[122] in situations such as *Abu Sayaf*/Philippines the State concerned cannot said to have any involvement. Thus in the former case, Article 51 becomes applicable, but in the latter scenario no such assumption

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[122] See SC Res. 1378 (14 Nov. 2001), preamble.

can be made *a priori*, because the drafters of the UN Charter did not envisage its application vis-à-vis non-State entities, for the sole reason that his would be used as a pretence to employ force and would jeopardize State sovereignty and thus international peace and security.

Despite the many allegations in relation to the relationship between Al-Qaeda and the Taleban regime[123], it has never been proven that the Taleban was responsible for the attacks of September 11 nor that the Taleban had the authority and control over Al-Qaeda required in respect of private entities to be legally attributed to it. The evidence released to date regarding Taleban ties to Al Qaeda does not suggest that Al Qaeda was under the direction or control of the Taleban in conducting the 9/11 attacks or any other acts of international terrorism[124]. Despite the absence of any concrete evidence the majority of states assumed that that the Afghanistan was responsible under the state responsibility principle which is a pre-requisite of the law of self-defence[125]. On the other hand others argue that state responsibility is not a pre-requisite of the law of self-defence. Such arguments are based on the widespread support of the international community of the Afghanistan intervention and suggest that there is a paradigmatic shift in the law.

It is clear from 9/11 and the war in Afghanistan that the 'effective control test for attribution did not apply to international terrorist acts in the context of the right of self-defence. It is questionable however, whether the threshold for attribution may have been lowered, such that any level of support, or even merely hosting or tolerating non-state terrorist groups, is now sufficient to make a state responsible for the conduct of those groups or whether the attribution requirement has been removed

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[123] United Kingdom Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, Oct. 4, 2001, at paras. 21.22 (visited June 18, 2002) <http://www.number.10.gov.uk/news.asp?NewsId=2686>. As to US confirmation of the facts, see David E. Sanger, White House Approved Data Blair Released, *N.Y. TIMES*, Oct. 6, 2001, at B6.

[124] Supra note 31, p. 189.

[125] See: Greenwood, C., International law and the war on terror, 2 *International Affairs* (2002), p. 321. .

altogether, thus permitting the conduct of non-state groups to qualify as an 'armed attack' even where there is no connection at all with a state. The better view is that the attribution requirement remains part of the concept of 'armed attack', but the threshold for attribution seems to be lowering. This conclusion is supported by two main factors. First, it accords with the legal arguments made by the United States in the aftermath of 9/11. Several hours after the attacks the United States asserted that 'it would make no distinction between the terrorists who committed these acts and those who harbor them. This was an attempt by the United States to engage the responsibility of the Taleban, and thus of the state of Afghanistan, for the terrorist conduct of Al-Qaeda. Moreover, the Wall case reaffirmed the view that self-defence arises in response to an attack by or on behalf of a state.

4. THE PROBLEM OF NECESSITY AND PROPORTIONALITY IN THE USE OF FORCE AGAINST TERRORISM

Where the response to a terrorist attack is of the Taleban/Afghanistan type (i.e. the State that is identified with the terrorists), the normal application of the proportionality principle is evident enough. Where, however, the attack has originated from the *Abu Sayaf*/Philippines type (i.e. no relation between the State and the terrorists), the situation becomes problematic, since it would defy all logic and the foundations of international law and relations to respond with armed force against the entire country in which the terrorists are based. On what legal basis would, for example, a victim State of *Jumma Islamiya*, use force against the Philippines, and how much? Lets imagine a scenario where Al-Qaeda commits a 9/11 type terrorist attack against country A, but immediately following the attack moves all its personnel and headquarters from Afghanistan to country B, which is not friendly to Al-Qaeda. In this manner Al-Qaeda transports itself within 10 countries. Against which country will the victim-State employ armed force? It is evident from this example that Article 51 UN Charter was designed to accommodate only situations where the aggressor possesses a permanent territory, and where force is to be employed only in respect of that territory and no other. Countries that argue in favour of the war on terrorism and support their claims on the basis of the UN Charter, as has also done the Security Council in resolutions that we have already examined, are obviously oblivious to the fact that even if they could encompass terrorism within Article 51, it certainly could not be used as a legal

basis for attacking terrorists in the territory of the countries where the terrorist group is situated – unless of course they are one and the same.

Therefore, if Article 51 is inapplicable, it follows that the principle of proportionality under such circumstances is inapplicable. Save in cases of invitation, the aggrieved State must seek the consent of the territorial State, unless the latter is completely incapable of taking charge of the situation, either because the terrorists have out-powered the legitimate State, or because it is materially incapacitated from taking any action. In such a case, it is presumed that the terrorist group occupies that State, and from that point onwards the terrorists become a legitimate object of self-defence in the territory that they effectively occupy. Therefore, save in the case of the last example, although the magnitude of the terrorist attack may be tantamount to an armed attack, the possibility of self-defence is a fiction. Armed force may only be employed after consent has been granted, re-confirming thus the primacy of the suppressionist-cooperation model.

5. THE PROHIBITION OF PRE-EMPTIVE SELF-DEFENCE126

Pre-emption[127] is a much broader and therefore much more dangerous doctrine than anticipatory self-defence since it is not preconditioned on overwhelming evidence of a horrific attack. Pre-emption refers to the 'initiation of military action in anticipation of harmful actions that are neither presently

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[126] For a further discussion on preemptive and preventive, see: Greenwood, C., International law and the pre-emptive use of force: Afghanistan, Al-Qaeda, and Iraq, 9 *San Diego International Law Journal (*2003), p. 9; Walter, B., Force, pre-emption, and legitimacy, 45 *Survival,(*2003), p.p. 117–130; Freedman, L., Prevention, not pre-emption, 26 *The Washington Quarterly (*2003), p.p.105–114, at : http://www.twq.com/

[127] Sapiro, M., Iraq: the shifting sands of pre-emptive self-defence 97 *AJIL* (2003), p. 600. Also: Taft, W., and Buchwald, T., Pre-emption, Iraq and international law, 97 *AJIL* (2003), p. 557. On anticipatory self-defence and pre-emptive self-defence see: Garwood-Gowers, A., Pre-Emptive self-defence: a necessary development or the road to international anarchy? 23 *Australian Year Book of International Law (2004), p.* 51; Also supra note 126, Greenwood, p. 7.

occurring nor imminent'[128]. The 2000 U.S. National Security Strategy explicitly seeks to eliminate the requirement of necessity noting that '[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries[129]. Thus, unlike anticipatory self-defence, which has a tenuous justification under a broad construction of the right to self-defence, pre-emption does not have any basis whatsoever in international law. Despite such absolute prohibition States like the United States that favour pre-emption now advocate changing rules of international law to accommodate their right to act pre-emptively against gathering threats and to take defensive action on the basis of their own perception of national interest and capabilities.

5.1 ARGUING AGAINST THE EXISTENCE OF A PRE-EMPTIVE USE OF FORCE APPROACH

Whereas in inter-State affairs, and despite the disparity of opinion between a part of US academia, in favour of a pre-emptive use of armed force, and European academic thought which generally rejects this position, the former is a vocal, albeit a minority view. Even more reason, therefore, that in the muddled legal landscape of the relationship between terrorism and the use of force provisions of the UN Charter, the possibility of entertaining a pre-emptive position would be untenable[130]. Nonetheless, from a practical point of view, it seems far easier to investigate and detect possible terrorist activity and take speedy action, than would be the case for pre-emptive inter-State use of force. In light of this observation and the events following 9/11 the USA has recently articulated its Global War on

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[128] Buchanan, A., and Keohane, R., The preventive use of force: a cosmopolitan institutional perspective, at: <http://www.poli.duke.edu/people/faculty/docs/Preventive%20Force.pdf>.

[129] The National Security Strategy of the United States of America (Washington, D.C.: The White House, 2002), online: <http://www.whitehouse.gov/nsc/nss.pdf> [National Security Strategy] at 19.

[130] For an opposing view, see: supra note 126, Greenwood, p. 7.

Terrorism (GWOT) strategy, whereby it views pre-emptive strikes as a necessary component of its anti-terrorist campaign[131].

Despite some academic support for the official US view that the Security Council and the General Assembly have fully recognised the right of self-defence against terrorism in both its pre-emptive and reactive dimension[132], this is a fallacy. Subsequent Council resolutions have only endorsed the particular situation of the Afghan campaign[133] and have in no way consented to the formation of a general rule on the matter. What is evident, however, is the tension between the agenda pursued by the Council and its inability to find support in other fora, including the General Assembly. Starting with Resolution 1526 in 2004[134] the Council clearly intended to solidify its assertion that terrorist attacks constitute a threat to international peace and security. The resolution reaffirmed the need to 'combat by all means, in accordance with the Charter of the United Nations and international law, threats to international peace and security caused by terrorist acts'. The new elements here are the 'all means' phraseology, which is reminiscent of all Chapter VII resolutions authorising the use of force, such as Council Resolution 678 (1991), as is reference to the UN Charter and international law. The former must certainly aim at strengthening the right of self-defence under Article 51, while the latter seems to be an attempt to make something out of regional alliance treaties, but most probably to interpret customary international law in such a way as to justify a developing approach outside the Charter framework. Since the language employed in Council resolutions is carefully chosen, the use of 'threats' to international peace and security, instead of 'breach' must signify some attempt to pursue a pre-emptive agenda.

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[131]See: United States National Security Strategy (Sep. 2002), available at: http://www.whitehouse.gov/nsc/nss.html

[132] Beard, J. M., America's new war on terror: the case for self-defence under international law, 25 *Harvard J L & Public Policy* (2002), p.p. 589-90.

[133] SC Res. 1373 (28 Sep. 2001); SC Res. 1378 (14 Nov. 2001).

[134] SC Res. 1526 (30 Jan. 2004).

This agenda has further been refined in subsequent Council resolutions. Resolution 1535 reaffirmed the Council's determination to combat all forms of terrorism 'in accordance with its responsibilities under the Charter of the United Nations'[135]. This clear reference to the Council's Chapter VII powers, while still being premised within the context of the anti-Al-Qaeda global effort, is nonetheless a statement of authority and intent (agenda) by at least a portion of the Council's permanent members. This agenda is predicated on a four-prong determination that did not exist prior to 9/11, and on the basis of which armed force would be justified by the Council under Chapter VII of the UN Charter. This is as follows: a) general acceptance that terrorism is a threat to international peace and security; b) perpetration of a terrorist act or threat thereof by a non-State actor justifies a forceful response akin to inter-State 'armed attacks'; c) formulation of 'threat' to encompass the possession of weapons of mass destruction (WMD), since all other cases of preparatory acts of terrorism would unlikely be characterised as falling within the ambit of 'armed attack', and; d) where these criteria were found to have been satisfied, armed force would be legitimate, irrespective of the vagueness of the direct addressee of the response.

In this light, Council Resolution 1540[136] has attempted to invent the third (c) element of the four-prong test we identified above, in order to formulate a pre-emptive approach. After affirming that the proliferation and delivery of WMD constitutes a threat to international peace and security, a matter which falls within its primary responsibility, it makes note of its grave concern 'by the threat of terrorism and the risk that non-State actors … may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery'. Subsequently, and still in the preamble, the Resolution reaffirms to combat terrorism through 'all means'. Interestingly, the proliferation and delivery of WMD involves action preparatory of a terrorist attack, facilitating thus the Council's pre-emptive agenda. Moreover, since all terrorist groups are in one form or another interested in getting

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[135] SC Res. 1535 (26 March 2004).

[136] SC Res. 1540 (28 April 2004).

their hands on WMD, the Council would not have a hard time justifying the authorisation of force in a particular case where it to raise the potentiality of WMD. This prelude to pre-emptive force seems now to have become a permanent feature of Council resolutions dealing with terrorism[137].

Despite my observations, as noted above, regarding a Security Council prelude to the justification of pre-emptive force to counter and prevent terrorism, such practice is in no way endorsed by the international community at large. As this is by definition a negative statement (i.e. that pre-emptive force is not permitted), from a methodological point of view, it is unlikely that any one State, or a group thereof, would set out to confirm this negation. Indeed, the rejection of such a pre-emptive principle would arise in practice where the principle itself is raised before an international body, or where its exercise was claimed vis-à-vis a particular State. In both instances, the negating State would have to raise its objections, and therefore make its refusal known to the whole international community, lest the principle of acquiescence be attributed to it in the future with regard to the particular principle. A series of General Assembly resolutions adopted between 2003 and 2004[138] clearly demonstrate a concrete emphasis on inter-State cooperation, avoidance of misinformation and certainly provide no basis for pre-emptive action. Indeed, since the emphasis is on co-operation, which is further reinforced by the Assembly's work on strengthening the international legal framework with new conventions whose primary foundation is the element of co-operation (terrorist financing, terrorist bombings and the forthcoming nuclear terrorism convention), it is self-evident, and given the antithesis of the vast majority of States to unilateral action in times of a divided Security Council, that the only favoured action in the prevention of terrorism is that entailing co-operation.

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[137] SC Res. 1566 (8 Oct. 2004).

[138] GA Res. 57/83 (9 Jan. 2003); GA Res. 58/48 (8 Jan. 2004); GA Res. 58/81 (8 Jan. 2004).

5.2 UNITED STATES NATIONAL SECURITY STRATEGY AS FURTHER EVIDENCE OF A REJECTION OF PRE-EMPTIVE USE OF FORCE

The president of the United States presented his National Security Strategy in September 2002 by which the US will constantly strive to enlist the support of the international community, but will not hesitate to act alone, if necessary, to exercise the right of self-defence by acting pre-emptively[139].

The US National Security Strategy refers to 'preventing our enemies from threatening us with weapons of mass destruction' and thus it clearly refers to the exercise of the right of self-defence pre-emptively, which appears to depart radically from the standard of self-defence established in international law as it premises self-defence not on the existing attack, nor indeed an imminent attack. The focus is on threats represented by terrorist and tyrants but that threats need not necessarily exist, as the US national security strategy supports military action against such emerging threats before they are fully formed, with an emphasis to prevention and pre-emption. Such a policy of pre-emption covers situations where uncertainly remains as to the time and place of the enemy's attack. It is unclear how speculative the threat might be in order to justify the pre-emptive use of self-defence. In the absence of the attack, questions arise not only relating to the evidence of a threat giving rise to self-defence, but also as to how proportionally measures can be checked. If the revolutionary view of the US strategy were to be accepted, the implications for the law of the use of force and its application in similar situations would be very serious. However, it is difficult to accept that such a strategy mark a shift in international law, since it has been rejected totally by the international community of states. Such general rejection may

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[139] See: National Security Strategy.

indicate the will of the international community to uphold the collective security system and reject the unilateral action as this was advocated by the US. The events of 9/11 and the subsequent war in Afghanistan do not provide any basis for the use of force against potential threats posed by terrorist groups and their host states, although the United States did make such a claim in its National Security Strategy of 2002. Rejection of that claim by most of the international community confirms that, for now at least, the right to use force against terrorism is limited to responding to actual 'armed attacks'. Whilst there may be exceptional circumstances in which it is justifiable for a state to take anticipatory action where a terrorist attack is truly imminent, such action would not fall within the expanded right of self-defence that has crystallized since 9/11 and the Afghanistan war.

As it became obvious from the present chapter the terrorist attacks of September 11, and the subsequent military responses have led the international community to discuss many issues related to the application of the jus ad bellum in the context of terrorism. I have put forward a number of reasons why the right of self-defense was applicable in relation to attack of 11 September. If one accepts such reasoning, it would seem to follow that a situation of armed conflict, if not a "war" in the technical sense, exists and has existed since that attack and that consequently the humanitarian law of armed conflict is applicable to the conduct of hostilities and the relationship between the adversaries. This assessment is correct up to a point, but only up to a point. The fact that the events of the 11th of September can be seen as an armed attack does not automatically signify that the law of armed conflict became immediately applicable, or that it would apply to all aspects of the 'war against terrorism'. The following section addresses briefly the question of whether terrorism can cross the threshold of severity so as to trigger the application of Protocol II to the Geneva Convention.

The terrorist attacks against the United States set in motion the events leading to the international armed conflict between the U.S and U.K. against Afghanistan--which is unquestionably covered by the

law of armed conflict or international humanitarian law[140]. Although that much is clear, is not yet clear whether terrorism cross the threshold of violence to be regarded as armed conflict that triggers the applicability of the law of armed conflict[141]? Can there be an armed conflict against terrorist organisations such as Al-Qaeda? More specifically does the global 'war on terrorism' constitute an armed conflict in a legal sense, so as to trigger the application of the Geneva conventions[142]? These are the questions addressed by means of the following section. Such questions become even more complicated by the ambiguous statement of the US declaration of the 'war on terrorism'[143]. The answers to all those questions have direct implication on all aspects of the counter-terrorism measures taken post September 11. Indeed if the 'war on terror' is an armed conflict in the legal sense, then all

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[140] Note that the question of use of force in self-defence is different from the question of application of international humanitarian law to terrorism. See: Kritsiosis, D, On the Jus ad Bellum and Jus in Bello of Operation Enduring Freedom, 96 *American Society of International Law Proceedings* 35 (2002), referring to the distinct spheres, histories, methodological traditions, stages of development, and circumstances of application of these two legal regimes: 'As represented in the UN Charter, the laws of the jus ad bellum proceed from the general prohibition of the threat or use of force by member States of the United Nations 'in their international relations' (Article 2(4)), while the jus in bello of the (GCs and APs) applies to such use of force. Thus, the Preamble to AP I declares that 'the provisions of the Geneva Conventions and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict. First note that there is no clear relation between the 'armed attack' requirement of the Charter and the 'armed conflict' threshold in the Conventions. Indeed, some circumstances (even in the inter-state context) would clearly trigger the application of the Conventions without necessarily satisfying the 'armed attack' requirement. See relatively: Jinks, D, The applicability of the Geneva Conventions to the 'global war on terrorism', 2 *Virginia Journal of International Law*, 2006.

[141] Some commentators provide a straightforward opinion with regards to the relationship between war and terrorism. For example Paul Wilkinson suggests that there can be no doubt that terrorism is a lesser evil than modern war, as more people died in the Lebanese civil war than were killed of international terrorism between 1975-1985. See: Wilkinson, P, Terrorism versus democracy: the liberal state response, (Frank Cass, 2002), p. 219.

[142] In general, there are two circumstances in which at least some provisions of the Geneva Conventions apply—armed conflicts and occupations. The concept of an 'occupation' within the meaning of Geneva law, though important and more complex than might be thought at first, is not analyzed in this Article. Simply put, the concept is not central to the analysis of whether any aspects of GWOT are governed by the Conventions.

[143] 'Although the 'war on terrorism' is not a traditional war', See:www.whitehouse.gov/news/releases/2002/11/20021105-2.html#3

aspects of the counter-terrorist measures taken post-September 11 should be govern by the rules of international humanitarian law[144].

I have already mentioned in previous chapters that the contemporary terrorist activity appears to be employed by non-state actors, transnational organisations, which are dispersed and decentralised. The rise of globally diffuse terrorist networks poses controversial questions as to whether terrorism should be conceptualised as an armed conflict. On what basis can we differentiate between those acts of violence that are best conceptualized as 'crimes' (subject to criminal law), and those acts of violence best conceptualized as 'armed conflicts' (subject to the law of armed conflict)? Although the Geneva Conventions and its Additional Protocols do not provide an obvious answer to this question, they take it for granted that not every act of violence should be perceived as part of an armed conflict. Article 1(2) of Additional Protocol II states that the Protocol 'shall not apply to situations of internal disturbances, and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. If terrorist attacks are clearly not armed conflicts, the implication is that the law of armed conflict is not triggered, and that states should deal with such threats through their own domestic criminal law, supplemented if necessary by bilateral and multilateral international cooperation agreements. Since 'isolated and sporadic acts of violence' are not armed conflicts, there can be no combatant immunity for the perpetrators, who are therefore subject to subsequent trial and punishment for their conduct.

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[144] Once an armed conflict begins, international humanitarian law comes into play automatically and it continues to apply until the end of the military operations. In both international and non-international armed conflicts, the Geneva Conventions, in general, govern the conduct of hostilities for the duration of the 'armed conflict'.Under the Geneva Conventions, the general rule is that international humanitarian law applies until the 'general close of military operations'. It applies in the whole territory of the warring states in case of international armed conflict and in the case of non-international armed conflict the whole territory under the control of a party. See: See: Greenwood, A, Scope of application of international humanitarian law, p. 51.

PART THREE

1. TERRORISM AND NON-INTERNATIONAL ARMED CONFLICT

The core provision of treaty law applicable to non-international armed conflict is Common article 3 of the Geneva conventions. Although Common Article 3 does not define what constitutes an 'armed conflict not of an international character' the authoritative ICRC commentary, besides suggesting a high threshold of violence, a 'enuine armed conflict'[145], provides tools to assess whether the threshold has been reached[146]. These criteria identify four kinds of circumstances that constitute 'armed conflicts' within the meaning of Common Article 3. Therefore, they provide a useful, if not indispensable, general framework for evaluating the applicability of Common Article 3 to any given situation.

Among the methods offered to help lawyers to determine the legal nature of a conflict are to check if the 'Government is obliged to have recourse to the regular military forces against insurgents organised as military and in possession of a part of the national territory'or if the 'government has recognised the insurgents as belligerents.' Sporadical acts committed by terrorist groups do not really fulfil the requirements set in Common article 3.

Common article 3 is further supplemented by the additional protocol II of 1977, which is applicable to armed conflicts between forces of a High Contracting Party and other armed forces that are 'under

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[145] Pictet, J., *Commentary on the Geneva Conventions of 12 August 1949: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, International Committee of the Red Cross, Geneva, 1952, p. 50.

[146] Ibid, p.p. 49-50.

responsible command, [and] exercise such control over a part of its territory[147] as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. The scope of Protocol II is further clarified in Article 1(2), which provides that the Protocol 'shall[148] not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' All are agreed that the negative definition in Article 1(2) is a valid definition of what falls below the threshold of armed conflict.

Protocol II, arguably represent important contributions to the definition of 'armed conflict.' First, the definition arguably implies that an 'armed conflict' exists only if the armed group exercises control over a portion of the state's territory. Thus the threshold of application is too high and excludes small scattered groups acting independently or lacking the central command. Thus, a group of people who are terrorist in the eyes of the government carries out an attack on the territory of the State where they come from and where they have their headquarters. History is replete with such examples, the most known being probably the IRA in Northern Ireland, the ETA in France and Spain, the Red Faction Army in Germany, etc. Most of these situations were and still are considered as sporadic internal disturbances that are falling below the threshold of applicability of international humanitarian law. In other words, these attacks do not usually amount to an armed conflict and fall within the domestic jurisdiction of States and are, thus, impervious to international legal regulation, barring the exception of the applicability of human rights law.

In *Prosecutor v. Tadic*, the ICTY the definition arguably classifies internal hostilities as an 'armed conflict' only if the armed violence is 'protracted.' The 'protracted' armed violence requirement, properly understood, does not restrict the application of humanitarian law in any appreciable way, but

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[147] With regards to the actual determination of whether there is actual control -the state in whose territory the conflict takes place can decide on whether the conditions mentioned in article 1, 1, are fulfilled. See relatively: Deter, I, *The law of war*, p. 206.

[148] Article 1(2) of additional protocol I.

is merely a restatement of the general rule excluding 'isolated and sporadic acts of violence' (disorganized and short-lived) from the scope of humanitarian law. The International Criminal Court (ICC) Statute also provides a more elaborate definition of internal 'armed conflict' than Common Article 3. The ICC Statute identifies several acts as war crimes when committed in internal armed conflict. Specifically, the Statute criminalizes 'serious violations of Common Article 3' committed in 'armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature[149].'Several aspects of the ICC Statute's approach should be emphasized. First, the Statute adopts the general framework of the Geneva Conventions in that it offers no affirmative definition of 'armed conflict.' Second, the Statute codifies the ICRC Commentary's view that internal 'armed conflicts' within the meaning of Common Article 3 do not include 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.' Third, the Statute adopts the ICTY's 'protracted armed violence' formulation *but does not apply this requirement to Common Article 3 conflicts*.

All the aforementioned point to the conclusion that a non-international armed conflict is determined after a factual assessment of the intensity, nature and duration of violence. Furthermore, depending on the intensity of the non-international armed conflict, Common Article 3 of the Geneva Conventions or Additional Protocol II could be applicable.

The parties to non-international armed conflict may be governmental authorities and armed groups or two or more armed groups[150]. The non-state groups that may constitute parties to the conflict must be capable of identification as a party to the conflict and have attained a certain degree of internal

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[149] ICC Statute, art. 8 (2)(d).

[150] See: ICC statute, article 8. 1.(f)

organisation[151]. While they must be capable of observing the rules of international humanitarian law, compliance with the rules is not itself a criterion. Nor it control of territory a requirement to constitute a party to a non international armed conflict[152]. Non –international armed conflict generally arises as the ICTY noted within a state, although the conflict need not unfold within one state's geographical borders[153].

Could the Al-Qaeda attacks be characterised as a non-international armed conflict within the meaning of Protocol II of the Geneva Convention or under common article 3? As I have said in the previous sections article 2 of the Additional Protocol II provides for 'conflicts which take place in the territory of a high contracting party between its armed forces and dissident armed groups or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerned military operations and to implement this protocol'. In this case, there was no control over territory by Al-Qaeda and certainly no willingness to implement the protocol. Al-Qaeda may function under an organised and responsible command, but it is not a command structure of a type contemplated by the protocol. In any event, Article 4(2)(d) of Protocol II explicitly prohibits acts of terrorism during non-international armed conflicts.

Similarly common Article provides no definition of a non-international armed conflict. It simply states that it applies in 'case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.' The U.S. is a High Contracting Party to the four Geneva Conventions, and the attack occurred on its territory. While precisely because common Article 3 is so vague, and because it is the residual provision, it is interpreted to apply to all situations that can be

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[151] See: ICRC Report on International Humanitarian Law and Contemporary Armed Conflict, p. 19.

[152] Although it is a jurisdictional threshold for the application of additional protocol II.

[153] See: Duffy, H., *The war on terror and the framework of international law*, (Cambridge University Press, 2006), p. 222.

considered as constituting armed conflicts. Can the Al-Qaeda attacks be considered as an act of war committed during a common Article 3 conflict? The ICRC Commentary on common Article 3 notes that the question of what constitutes an armed conflict not of an international character: 'was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegates feared that it might be taken to cover any act committed by force of arms—any act of anarchy, rebellion, or even plain banditry.' While the delegates shied away from defining conflict, they did discuss certain criteria that could be considered as relevant[154]. These are set out in the Commentary, and as it notes, they 'are useful as a means of distinguishing genuine armed conflict from a mere act of banditry or an unorganised and short-lived insurrection.' However, the Commentary goes on to state that: 'it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory[155], and there is often some sort of front.' It is obvious that by no stretch of the imagination can one construe the Al-Qaeda attacks of September 11 as an armed conflict within the meaning set out in the Commentary to common Article 3. Perhaps if we reach the point where Al Qaeda has actually formed militia or organised armed forces (combatants) within U.S. territory, and engages the U.S. armed forces in military battle, then we can speak of a non-international armed conflict between Al Qaeda and the U.S. But in that case, Al-Qaeda would also have to satisfy at least some of the other

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[154] Commentary IV Geneva Convention relative to the protection of civilian persons in time of war, Geneva, International Committee of the Red Cross 1958) p. 35, para. 1, p. 36.

[155] While CA 3 does not require territorial control by the non-state party, the conflict must still occur "in the territory" of a High Contracting Party. Some analysts construe this requirement to mean that the conflict must be limited to the territory of a High Contracting Party.28 For this element alone, terrorist attacks on civilian targets in New York may suffice.

criteria set out in the Commentary for distinguishing genuine armed conflict from banditry, or terrorism, for that matter.

According to the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as under the definitions of the newly established permanent International Criminal Court, hostile acts must be 'protracted' in order for the situation to qualify as an 'armed conflict.' In fact, the Yugoslavia Tribunal has specifically stated that the reason for this requirement is to exclude the application of humanitarian law to acts of terrorism.' On the other hand, the Inter-American Commission on Human Rights says that intense violence of brief duration will suffice. Likewise, it remains to be seen whether the mere gravity of damage resulting from the September 11 attacks will, in retrospect, become a 'decisive point of reference for the shift from the mechanisms of criminal justice to the instruments of the use of force'. Whether or not the conflict needs be protracted, and whether or not intensity can take the place of duration, the beginning and end must be identifiable to know when humanitarian law is triggered, and when it ceases to apply.

Traditionally, acts of international terrorism were not viewed as crossing the threshold of intensity required to trigger application of the laws of armed conflict. Some authority to the contrary is suggested by historical precedents involving the use of military force against extraterritorial non-state actors as indicative of 'war.' But these examples still fail to make the case that use of such force necessarily triggers the law of armed conflict. With regards to a non-international armed conflict, the use of force employed must cross a certain threshold of intensity and be distinguished from sporadic and isolated acts of violence. Arguably the resort to violence witnessed on September 11 reached that threshold. It is however, the second part of the test that is the critical one: can an entity such as Al-Queda possess the characteristics of an armed group as understood by international humanitarian law, such that it can be a party to a non-international armed conflict? The key question is whether they have sufficient identifiable scope and membership, sufficient organization and structure and a capacity to observe the rules on international humanitarian law. In the case of Al-Queda the element of identifiable scope and membership is problematic since Al-Queda consists of loosely connected cells. Although some suggest otherwise, it is widely considered, even post 9/11 that terrorist organizations lack the characteristics of armed groups and that international humanitarian law is not the most appropriate

legal framework to govern the relationship between persons associated with terrorist activities and those states executing the 'war on terror[156]'.

In fact, the 'war on terror' is clearly not an armed conflict at all. It consists of a multi-faceted counter-terrorism campaign, some aspects of which involve the use of military force, most of it carried out in States where there is no armed conflict, although aspects of the counter-terrorism campaign assume the characteristics of armed conflict where the US attacks a State considered to be harbouring or assisting Al Qaeda, as it did in Afghanistan. In this case, it would be an international armed conflict against the attacked State, rather than Al-Qaeda, since Al-Qaeda is not a State. Otherwise, the so-called 'war on terror' which the US is waging against Al Qaeda does not satisfy the conditions of the Geneva Conventions to be considered as an armed conflict. The view that armed conflict may arise between states and organizations such as Al-Qaeda has relatively little support, even in the post September 11 era. As one commentator argues 'until now the law of armed conflict has always been considered to be a matter between states, but the law has been moving towards recognizing as quasi-states dissident armed factions and authorities representing liberation movements. It might be possible to argue that a state can be involved in armed conflict against an organization[157]. However, as the law stands at the present moment such an argument does not reflect the contemporary legal reality of international humanitarian law'.

While asserting that an armed conflict can be waged with an entity such as Al-Qaeda may not be an accurate assessment of the laws as it stood at the time of the attacks, the current debate highlights this as an era deserving further analysis and where future development will take place. There are however,

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[156] Supra note 153.

[157] Rogers, A., *Terrorism and the laws of war: September 11 and its aftermath*, (21 September 2001), found at: www. Crimesofwar.org.

some conclusions that we can draw at this stage for the relationship between terrorism and international humanitarian law.

The most important conclusion that we can draw with regards to the aforementioned relationship is the fact that there are clear criteria for assessing the existence of an armed conflict, which trigger the applicability of international humanitarian law. Therefore, the mere fact that a state may characterise a group as terrorist group does not in itself have any legal significance.

Perhaps the critical question for determining whether the laws of armed conflict apply here is whether the terrorist attacks were a sufficiently organized and systematic set of violent actions that they crossed a sufficient level of intensity to be considered 'armed conflict'. There can be no doubt that, whatever the 'level of intensity' required to create an armed conflict, the gravity and scale of the violence inflicted on the United States on September 11 crossed that threshold. However, given the importance of the legal qualification of armed conflict and of related violence for the content of the applicable law, evaluation is necessary to determine, on a case-by-case basis, whether a particular situation crosses the threshold of violence to be considered as an armed conflict. Moreover, central element of the notion of armed conflict is the existence of 'parties' to the conflict. The parties to an international armed conflict are two or more states (or states and national liberation movements), whereas in non-international armed conflict the parties may be either states or armed groups – for example, rebel forces- or just armed groups. In either case, a party to an armed conflict has a military-like formation with a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL. However, much of the ongoing violence taking place in other parts of the world that is usually described as 'terrorist' is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterised as a 'party' to a conflict within the meaning of IHL.

Having ascertained in the present chapter that the 'war model' is not applicable in the struggle against terrorism, I will proceed in the following chapter to a discussion of law enforcement measures and how they are implemented and influenced by the war on terrorism doctrine. Antonio Cassese has pointed out that '[w]hile it is obvious that in this case 'war is a misnomer', 'the use of the term 'war' has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious

that it can be equated in its evil effects with a state aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war'[158]. On the other hand, President Bush and others speaking on behalf of the U.S. administration have clearly suggested that some aspects of the War on Terror will not involve armed conflict, permitting us to conclude that in their view, those aspects, at least, will not be covered by humanitarian law. On September 20, 2001, President Bush said in an Address to a Joint Session of Congress and the American People, 'The war will be fought not just by soldiers, but by police and intelligence forces, as well as in financial institutions[159]'. These different battlefields will be discussed in the following chapter.

CONCLUSION

My analysis thus far has concentrated on whether a terrorist act can be assimilated to the concept of an 'armed attack' in order for self-defence to be justified. I have shown this to be possible, albeit under very strict and limited circumstances, certainly not on pro-active basis, and within the ambit of the UN Charter. A community consensus now appears to exist that armed attacks may be conducted by non-state actors, i.e. terrorist organizations. Looking at the reaction of States and international organizations to the events of 9/11 and the military action against both the Taleban and al-Qaeda, I concluded that there is a perceptible shift in the international community's understanding of the law of self-defence.

However, I have argued in this chapter that the UN Charter is problematic in determining whether or not anything equivalent to an armed attack could have taken place against a State by a non-State entity. The only real and tested model at present is that of Security Council Resolution 1368, following the events of 9/11, which recognised in that narrow particular context a right of self-defence in accordance

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[158]Cassesse, A, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 12 *European Journal of International Law* (2001), p. 993

[159] <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.

with the UN Charter. Interestingly, however, at the same time that Resolution 1368 was adopted the General Assembly made no reference in its own resolution to that right. Despite the attempts of the USA and UK to ensure a Council resolution prior to the 2003 Iraqi conflict – although strictly speaking the Iraq campaign did not concern terrorism directly – no such resolution authorising the use of armed force was forthcoming, thus confirming our hypothesis that the vast majority of States is unsupportive of the pre-emptive approach of countering terrorism, thus clearly favouring the suppressionist approach, albeit in the following ways: a) through inter-State cooperation in the criminal justice field; b) use of armed force on the basis of the 9/11-type Security Council resolutions, and; c) use of force under Article 51 UN Charter where the terrorist organisation is deemed to be an agent of the State wherein it has taken refuge. This is true notwithstanding the fact that subsequent to the events of 9/11 the Security Council has adopted a series of resolutions whereby it has characterised terrorism as a threat to international peace and security and has thus attempted to bring about language that would justify future pre-emptive action against non-State entities.

Despite the fact that states appeared to accept the application of article 51 to the military actions in Afghanistan, the military intervention of Iraq and the National Security Strategy came to place more emphasis on the collective security system of the UN. Indeed the pre-emptive use of force doctrine has been totally rejected. Thus, to a limited degree a state may 'anticipate' self-defence in the sense described by Sir Humphrey Waldock: 'where there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to have begun to occur, though it has not passed the frontier'[160]. The Security Council action after September 11 can be cited to support anticipatory self-defence in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned, though not yet underway.

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[160] Waldock, G, The regulation of the use of force by individual states in international law, 81 *Haque Recueil* (1996
), p. 498.

By accepting the legality of using force in self-defence against the Taleban and Al-Qaeda following 9/11, the international community recognized the existence of an expanded right of self-defence that permits the use of military force against states that host or harbour non-state terrorist groups that have already committed serious attacks. This new right still requires the actions of non-state terrorist organizations to be attributable to a state, but the threshold for attribution is now significantly lower. Whether this expanded right of self-defence will ultimately prove to be a necessary and desirable development in response to new threats in the international system remains to be seen. However, it is clear that the current notion of self-defence is now a broader, more uncertain concept that it was previously. While the development of an expanded right of self-defence against terrorism is less troubling than the doctrine of pre-emptive self-defence proposed by the United States in 2002, it carries a similar risk of abuse by states. Military force alone will not defeat terrorism, but where such force is clearly necessary it is preferable for military action to be taken by way of Security Council authorization. Thus, the right to take unilateral action in self-defence against terrorism should be relied on only in exceptional circumstances. The post-9/11 right to use force in self-defence against states that host or harbour terrorist organizations that have already committed serious terrorist attacks raises three main concerns. The first relates to the range of targets that may be the subject of force in self-defence. Given that transnational terrorist organisations may have cells in many different states, the post-9/11 right to use force against states that host or harbour such groups could potentially allow each of these states to be targeted by military action. At present, the doctrine of harbouring or hosting appears to make no distinction between a state that hosts or harbours one terrorist who poses little ongoing threat, and another state that hosts an entire terrorist network which continues to commit acts of violence. To avoid the uncertainty of having multiple targets it is necessary to refine this doctrine, so that it provides a more concrete basis for identifying those states whose assistance or acquiescence in terrorist activity makes it truly necessary to use military force in self-defence. Unless this is done, there will remain a danger that states may use the new right of self-defence against terrorism as means of removing unfriendly governments or pursuing their own strategic interests.

The third and most significant concern about the extended right of self-defence against terrorism relates to evidence provision and the authority of states to make unilateral decisions to respond with force. Unless states are required to present clear and convincing evidence of the need to use military force in self-defence against a state that harbours or hosts terrorist groups, there is a danger that this new right

of self-defence may be abused. Establishing a Security Council-based mechanism of this nature is vital to ensuring the legitimacy of further military responses to terrorism. While the right of a victim state to act in self-defence does not require prior approval from the Security Council, it is clearly preferable for military action against terrorism to be conducted under the umbrella of Security Council authorisation.

The doctrine of pre-emptive strikes formulated in the recent US National Security Strategy proposes to adapt this concept to new perceived threats in a way that would constitute an unacceptable expansion of the right of anticipatory self-defence. What it is clear though is that terrorism does not constitute a free-standing aspect of jus ad bellum and the response to it is justified only to the extent that accords with the otherwise applicable framework of the law of self-defence.

I argue that although the 'war on terror' may include the military action in Afghanistan, it is not per se an armed conflict in the legal sense. There can be no humanitarian law conflict without identifiable parties. 'Terror' or 'terrorism' as a phenomenon cannot be a party to the conflict. As a result, a 'war on terror' cannot be a humanitarian law event. Likewise, terrorism in general and the September 11 attacks along with the subsequent fight against terrorism is not an armed conflict. Is one of these situations when it is said that a war is declared when this expression is used as a euphemism for saying that there are severe differences and considerable hostility between the parties[161]. Thus, the attacks can be considered as a breach of various international conventions against terrorism, as a crime against humanity but not as war crimes. The classification of the September 11 attacks as war crimes depends on them constituting the initiation of, or taking place in the context of an armed conflict. If they do, the rules of international humanitarian law apply to those acts-which has consequences for rules on permissible targeting and detention of persons in connection with an armed conflict and serious violations of these rules may be prosecuted as war crimes. However, the September 11 attacks cannot

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[161] Similar declaration of war made by US Senator, Mr. Jesse Helms who stated: the Serbs declared war on the world. See relatively: Wall Street Journal, 8 June 1995.

amount to an armed conflict as they do not fit easily into any category of armed conflict (international and non-international).

CHAPTER 4

THE CHANGING PATTERN OF INTER-STATE COUNTER-TERRORISM ACTION

INTRODUCTION

The events of 9/11 have had enormous repercussions in terms of the awareness of states as to the danger posed by terrorist groups. This is evidenced by the adoption of new security doctrines, such as the American National Security Strategy[1], the European Security Strategy[2], the Report of the UN High Level Panel on Threats, Challenges and Change[3]. All of these documents acknowledge the dangers posed by transnational terrorism especially in combination with the presence of 'failing states' and the proliferation of weapons of mass destruction. The recent activities of transnational terrorist groups led to the US 'war on terror' doctrine, which by itself elevates the status of terrorists from criminals to enemies. However, as I have demonstrated in my previous chapter terrorist activity in general cannot be characterized as an armed conflict. Thus, the traditional view according to which terrorists were held responsible for their unlawful acts under domestic law remains valid. The characteristics of contemporary terrorist activity however, indicates the need for the development of more central mechanisms beyond national states to effectively deal with the problem.

In the first chapter of the thesis I considered the counter-terrorism models deriving from the various counter-terrorism conventions adopted by the UN General Assembly. It became evident that the

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[1] Available at: http://www.whitehouse.gov/nsc/nss.pdf

[2] A Secure Europe in a Better World - A European Security Strategy, adopted by the European Council on 12 December 2003. Available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.

[3] Annan, K., In larger freedom: towards development, security and human rights for all, 21 March 2005. at: http://www.un.org/largerfreedom.

terrorist bombing convention establishes an inter-state co-operation model. It is obvious that all these conventions require contracting states to introduce appropriate national legislations in their own jurisdiction in order to punish the specific crimes mentioned by each convention. Regrettably, implementation of these conventions has not been easy and, more importantly, no operational mechanism has been established to evaluate measures undertaken by the states parties. However, by way of resolution 1373 of 28 September 2001, it was decided by the UN Security Council that member states are under obligation to prevent the financing of terrorism and the sheltering of the performers of terrorist acts. Under paragraph 6 of this resolution, it was decided that member states were obliged to report the concrete measures taken to implement their obligations within 90 days to a committee set up for this purpose. Thus, at the global level the United Nations Security Council assumed a central role[4] in the fight against terrorism by created mechanisms and subsidiary bodies such as the Counter-terrorism Committee, which monitors state practice and obliges states to promote international cooperation in the suppression of terrorism. Similarly regional bodies put the struggle against terrorism at the core of their activities. Likewise there have been terrorism specific developments within the EU and the Council of Europe. More notably the introduction of the European Arrest warrant in 2002 which provides for the extradition procedure in Europe was particularly welcome because it removed the previously existing limits to extradition such as the political offence exception. The multiplication of efforts to develop a coordinated response to terrorism both at the global and regional levels gave to the counter-terrorism approach a more centralised dimension.

My aim in the present chapter is to examine the approach that emanated from the co-operative and compulsory mechanisms under relevant Security Council instruments and ascertain to what degree they leave any room for the adoption of unilateral action, inter-State co-operative model, or whether the

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[4] As the Chairman of the CTC noted: counter-terrorism has gone global with the United Nations at the centre. See: 4734th meeting of the Security Council, 4 April 2003, p. 3. S/PV.4752.

Council has assumed a centralised decision-making authority. As it will become evident the atrocities of September 11 have generated an international consensus to effective collective enforcement. However, to what an extent this collective enforcement model leaves room for a selective application of procedures that undermine rather than safeguard international cooperation is an open matter for discussion.

In the aftermath of 11 September, terrorism was elevated to the status of a threat to international peace and security, and a comprehensive framework of legal measures was established aiming at preventing and eliminating it. Resolution 1368 of 12 September 2001 expressed the readiness of the Security Council to take all necessary steps to respond to the attacks, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter. The Resolution unequivocally condemned the attacks, and recognized the inherent right of individual or collective self-defence in accordance with the Charter. Furthermore, the Resolution stressed the accountability of the perpetrators, organizers and sponsors of the attacks, and of those responsible for aiding, supporting or harboring them.

Two weeks later, on 28 September, Security Council Resolution 1373 laid down a legal framework in which specified measures must be taken by states in order to eliminate terrorism. This resolution falls within the scope of enforcement action by the Security Council under Chapter VII of the Charter. However, it does not envisage the use of force as an exclusive, or regular, means of dealing with terrorism. Rather, it deploys a wide range of measures, with co-operation between states and the establishment of a standing committee to monitor implementation forming the center-piece. It also recalled an earlier resolution, Resolution 1189 of 1998, which affirmed the duty of every state to refrain from organizing, instigating, assisting or participating in terrorist acts in another state, or acquiescing in organized activities within its territory directed towards the commission of such acts.

1. RESIDUAL FORMS OF INTER-STATE CO-OPERATION POST- SEPTEMBER 11

In the aftermath of the Bali bombing attack, the Security Council reminded member States of their obligation to cooperate among themselves and the Council itself on the basis of Resolution 1373[5]. The same was repeated in verbatim language in subsequent resolutions[6]. In all these resolutions, the Council inserted a preambular phrase that deserves particular mention. Thus, Resolution 1438 notes that the Council is 'determined to combat terrorism in accordance with its responsibilities under the UN Charter'. Since, in the words of the Council, even domestic terrorist bombings are a threat to international peace and security, the Council views its potential role as encompassing both domestic and international terrorism.

The significant difference between the cooperation provisions of the 1998 Bombing Convention and those contained in Resolution 1373 is that the former establishes an inter-State approach, whereas the latter creates two new regimes: a) inter-State co-operation between particular States that would under other circumstances be unwilling to exchange information or succumb to each other's demands for mutual legal assistance, and; b) co-operation between a State and the Council itself. The first of these regimes may be problematic in practice, but it was certainly intended as the creation of an obligation towards countries that would otherwise not become parties to the 1998 Terrorist Bombings Convention and which would never enter into bilateral relations with countries allied to the USA. Although from a practical point of view it is very difficult to monitor their efforts in exchanging information and other intelligence – it also defeats the purpose of the obligation – it may be invoked against such unwilling countries in the future as constituting a material breach of an obligation.

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[5] S.C. Res. 1438 (15 Oct. 2002).

[6] S.C. Res. 1440 (24 Oct. 2002); S.C. Res. 1465 (13 Feb. 2003); S.C. Res. 1530 (11 March 2003).

The adoption of Resolution 1373[7], which is in effect a mini convention on terrorist financing and terrorist bombings, changed the international legal landscape. All States are now under a strict and monitored obligation to prevent terrorist attacks, including by early warning systems and exchange of information cooperation; afford greater assistance to each other; find ways of accelerating and intensifying exchange of information regarding explosives and sensitive materials, including weapons of mass destruction. If this was not enough, Resolution 1373 called on States to become parties to the 1998 Bombing Convention. An examination of recent Security Council resolutions dealing with the issue of terrorist bombings suggests a divergence from the 1998 Bombing Convention. Whereas the Convention is inapplicable where there does not exist an international element, in the cases of the 2002 Chechen hostage crisis in Moscow[8], the February 2003 Bogotá bombing blast[9] and the Madrid train bombing incident[10], the Council relying on its prior Resolution 1373[11], characterised these incidents as threats to international peace and security and urged States to adhere to their obligations to cooperate on the basis of Resolution 1373[12]. All these incidents took place within one country and were committed by groups indigenous to these countries and would not normally have come under the scope of the Convention. Since Resolution 1373 is binding on all States on account of Article 25 UN Charter, the jurisdictional and co-operative obligations established under the Resolution take precedence over obligations stemming from the 1998 Convention. This again is defendable on the basis of Article 103

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[7] See: Second Progress Report on terrorism and human rights, UN Doc. E/CN.4/Sub.2/2002/35 of 17 July 2002, para. 25-29.

[8] S.C. Res. 1440 (24 Oct. 2002).

[9] S.C. Res. 1465 (13 Feb. 2003).

[10] S.C. Res. 1530 (11 March 2004). Although it later transpired that Al-Qaeda was responsible for the attack, the Council relied on the statements of the Spanish government and named ETA as being the culprit.

[11] Rosand, E., Security Council Resolution 1373, the Counter-Terrorism Committee and the fight against terrorism, 97 *AJIL* (2003), p. 333.

[12] From a practical point of view, what S.C. Res. 1373 cannot do is dictate the various procedures that are customarily attuned on the basis of bilateral or multilateral agreements, such as extradition (including the aut dedere principle) and mutual legal assistance, but it can demand for the lifting of bank secrecy as this has not traditionally been left to inter-State settlement.

of the UN Charter, whereby obligations accruing from the UN Charter supersede all other obligations that a State may have assumed. This observation, moreover, reinforces the unilateral internal model and brings it closer to a form of universal jurisdiction. It also seems to unilaterally dispel the inhibitions inherent in the 1998 Convention whereby States preferred to deal on their own with internal bombings.

Obligations under Article 103 UN Charter, however, should not be in conflict with established human rights norms. In considering the UK's periodic report in December 2001, the UN Human Rights Committee was concerned that legislative measures adopted by the government could have 'far-reaching effects' requiring derogations from human rights obligations. During questioning the UK argued that it was fulfilling its obligation under Resolution 1373, since according to Article 103 UN Charter its obligations under the Charter take precedence over those owed to the Human Rights Committee (HRC)[13]. The HRC responded that States parties must ensure that measures taken pursuant to Resolution 1373 must be in full compliance with the ICCPR[14]. As a result of such problems the Council adopted Resolution 1456 drawing attention to human rights obligations within the fight against terrorism[15]. As I shall show in the proceeding section, some countries have transposed their obligations under Resolution 1373 into domestic law in such a way as to hinder the pursuit of legitimate rights[16] and expedite extraditions to countries that consistently violate fundamental human rights.

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[13] Human Rights Committee (HRC), Consideration of Reports Submitted under Art. 40 ICCPR: Concluding Observations on the UK (6 Dec. 2001), UN Doc. CCPR/CO/73/UK; UN Doc. CCPR/CO/73/UKOT.

[14] Ibid, para. 6. A similar position was taken by Sweden before the UN Committee against Torture. However, the Committee did not address Sweden's justifications under Resolution 1373 because the applicant failed to justify violation of Article 3 of the 1984 Torture Convention. Case No. 199/2001, Attia v Sweden (5 Dec. 2003), UN Press Release available at: http://www.unhchr.ch/huricane.nsf/0/10B4B4B92B5D3AA93DC1256DF3005BAACE?opendocument. See, Swedish Response to the Committee Against Torture in Attia v Sweden, CAT Doc. CAT/C/31/d/199/2002 (24 Nov. 2003), para. 4.4.

[15] S.C. Res 1456 (20 Jan. 2003). This was given panegyric character through the formulation of a Declaration annexed to the body of the Resolution.

[16] New Zealand's response to S.C. Res. 1373 was a series of legislative changes and other practices involving the expulsion of asylum seekers suspected of terrorist activities back to their country of origin. The UN HRC

2. THE CENTRALISED SECURITY COUNCIL MODEL THROUGH RESOLUTION 1373

As already said the work of the General Assembly and its subsidiary bodies that have particularly since 1996 augmented the international anti-terrorist legal arsenal, the events of 9/11 eliminated many political differences in the Security Council and gave to it a protagonist role[17]. Shortly after 9/11, the Security Council quickly framed Resolution 1373, compelling all States within the UN system to work together against the aiding, supporting, and sponsoring terrorism. This has had a cataclysmic effect within other regional organisations and other inter-State bodies[18], although such bodies are not bound by Security Council resolutions, in accordance with Article 103 UN Charter.

Before the events of 9/11, the Security Council had adopted several resolutions that addressed the problem of international terrorism and the role of States in supporting it and had imposed some economic sanctions. Specifically, Resolution 1214 recalled that the Council was deeply disturbed that Afghan territory was being used to shelter and train terrorists and plan terrorist acts[19]. This was followed by Resolution 1267, according to which the failure of the Taleban authorities to comply with Resolution 1214 was unacceptable and as a result the Security Council had decided under Chapter VII of the UN Charter to take all measures to secure that Osama Bin Laden was handed over to any

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concluded that despite assurances by New Zealand that rights would be respected, withou monitoring mechanisms these practices could pose a serious risks to exposed persons. See HRC Concluding Observations on New Zealand (7 Aug. 2002), UN Doc. CCPR/CO/75/NZL, and UN Committee Against Torture (CAT) Conclusion and Recommendations on New Zealand, CAT Doc. CAT/C/CR/32/4 (19 May 2004), available at: http://www.unhchr.ch/html/menu2/6/cat/cobs/32-nz.doc.

[17] For a discussion of the UN's work against terrorism, see: Rostow, N., Before and After: The Changed UN Responses to Terrorism since September 11, 35 *Cornell ILJ* (2002), p. 475.

[18] In February 2002, the G7 heads of State met in Ottawa and agreed on a new programme that would involve the coordination of national computer systems in order to identify terrorists. This is believed to involve closer co-operation between national authorities regarding the disclosure of certain types of information.

[19] S.C. Res. 1214 (8 Dec. 1998).

national authority which had indicted him. Resolution 1269 encouraged States to co-operate and Resolution 1333 authorized economic sanctions against the Taleban and was the first resolution to require States to impose asset freezes without delay against the funds and assets of Osama Bin Laden and those connected with him. The attacks against the United States led the Security Council to take further steps against international terrorism by adopting two resolutions that require States to co-operate on a global level by taking active measures to implement counter-terrorism measures.

However, whereas pre-9/11 Council resolutions imposed obligations on States with regard to terrorist financing, these were limited to the Taleban and Al-Qaeda. Moreover, the possibility of further or supplementary unilateral action was possible, while States were free to undertaken bilateral and multilateral obligations concerning cooperation in their dealings with private financial institutions. Thus, there was a narrowly defined, centralised Council model, but this existed the inter-State model. This situation was radically altered with the adoption of Council Resolution 1373[20], which requires all UN member States to prevent and suppress the financing of terrorist acts and to refrain from providing any type of support for terrorist and to deny safe heaven to those who either finance or participate in terrorist operations. More specifically, Article 1(b) requires States to 'create an offence for persons who provide, directly or indirectly funds with the knowledge that such funds will be used to carry out terrorist activities'.

The general character of the Resolution has ultimately abrogated the possibility of independent unilateral action, as well as bilateral or other forms of multilateral cooperative models. This is not true with regard to terrorist bombings, where unilateral action is permissible and bilateral or multilateral cooperation remains the norm. It seems that the centralisation of terrorist bombing enforcement by the Security Council has been deemed as practically impossible, as has been the recognition that the matter

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[20] Szasz, P., The Security Council starts legislating, 96 *AJIL (*2002), p. 901.

also entails a domestic political sensitivity which is best dealt with at the domestic level. In the field of terrorist financing, it must seem to the Council and the USA/UK axis that centralised enforcement is not only desirable, but is indeed practically viable, even if not fully effective in its first years of operation. A reason for this could be the uniformity in the operation of financial systems around the world and the blacklisting of those States by FATF that harbour laws favouring non-transparent financial institutions. Furthermore, Resolution 1373 addresses the issue of implementation by establishing a Counter-Terrorism Committee (CTC)[21] as a subsidiary organ of the Security Council, to monitor implementation of the resolution.

3. THE ROLE OF THE COUNTER-TERRORISM COMMITTEE

The principal organ dictating the process of cooperation between UN member States and the Security Council is the Counter-Terrorism Committee (CTC), established under Resolution 1373[22]. The CTC monitors the implementation of the terms of Resolution 1373, which calls on States to report to the CTC within a particular spatial framework on the measures they have taken to implement it. The CTC seeks information from States on all steps taken to implement the above-mentioned measures, identifies the needs of those countries that have difficulties and tries to find the proper assistance available either on a bilateral or multilateral basis, or through international organizations. The CTC makes sure that channels of cooperation remain open and demands that States keep it informed of all legal and enforcement incidents taking place on their territory. Where States have failed to provide a report, or have provided inadequate or late responses in the view of the CTC, it has written directly to

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[21] The Committee was established in accordance with Rule 28 of the Security Council's Rules of Procedure, which states that the council may appoint a committee in order to deal with a specific questions.

[22] Following a Report by the CTC itself, UN Doc. S/2004/70 (14 Nov. 2003), the Council adopted S.C. Res. 1535 (26 March 2004), by which it strengthened the CTC's role and mandate and gave it a semi-permanent status.

the Council for further action[23]. The same role is played by the Terrorist Sanctions Committee established by the Security Council through Resolution 1269 in 1999[24]. Initially set up to monitor the sanctions against the Taleban regime in Afghanistan it now survives with a broader mandate with a focus no longer exclusive to Afghanistan[25].

The Committee's overall role is to require member states to take counter-terrorism measures that they may not otherwise take without an obligation under a treaty. States are required to submit reports regarding the legal and enforcement measures that they have taken to criminalize terrorist activity and to interdict terrorist financing[26]. Indeed, the vast majority of States seem to comply with Resolution 1373 and the CTC has received numerous and encouraging reports from the majority of UN members related to the legal and regulatory framework that has been created to prevent the financing of terrorism and freeze accounts linked to terrorist organisations. It has not only been the chief protagonists and sponsors of the Resolution that have been forthcoming with relevant information. Other, less developed countries have shown equal enthusiasm in adapting their legislation to the exigencies prescribed by Resolution 1363 and the CTC guidelines[27]. The government of Belarus, for example, in its fourth report addressed to the Committee has developed a legal mechanism for the effective prevention of the financing of terrorism by amending and supplementing the Act of the Republic of Belarus on 'Measures to prevent the legalization of funds obtained by illegal means' of 19 July 2000. Moreover, it is taking further steps to expand cooperation with international, regional and sub-regional organisations

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[23] Letter dated 7 May 2004, UN Doc. S/2004/361 (10 May 2004); Letter dated 31 October 2003, UN Doc. S/2003/1056 (31 Oct. 2003); Letter dated 31 March 2003, UN Doc. S/2003/404 (3 April 2003).

[24] S.C. Res. 1267 (15 Oct. 1999).

[25] As modified on the basis of S.C Res. 1455 (17 Jan. 2003).

[26] For information on the co-operation received from States, see Security Council 58 th Session, 4792nd meeting, (23 July 2003), UN Doc. S/PV.4792 and Security Council , 58th Session, 4734th meeting , UN Doc. S/PV.4734 and UN Doc S/PV.4618, S/PV.4618.

[27] Stomseth, J. E., The Security Council's counter-terrorism role: continuity and innovation, 97 *Proceedings of the American Society of International Law* (2003), p. 41. Also: Rosand, E., Security Council resolution 1373, the Counter-terrorism Committee and the fight against terrorism, 97 *AJIL* (2003), p. 333.

in order to strengthen customs and border control[28]. Similarly, the government of Haiti has taken measures to amend the Haitian Penal Code and a Counter-Terrorism Bill is reportedly being drafted[29].

Many States have reported that the aforementioned requirement is covered by existing national anti-money laundering legislation[30]. The Committee has taken the view that although money laundering and terrorism are inter-related crimes they are not completely identical. This is because money laundering can be defined to mean '*the processing of criminal proceeds to disguise their illegal origin'*. By contrast the financing of terrorism often involves money that is not necessarily delivered from illegal sources, but which is nevertheless used to fund terrorist activities. For instance, assets acquired by legitimate means, and even declared to tax authorities, can be used to finance terrorist activities.

Based on the information provided in the reports, the Committee seeks to address the following questions: a) ascertain what measures States have adopted for criminalizing terrorist financing; b) what measures States have taken to freeze funds, financial or other assets of persons suspected of being involved in terrorist operations[31], and; c) what preventive controls States are employing to ensure that funds intended for the financing of terrorism are not transferred through charitable or religious organisations. It is indeed remarkable how a large number of States have been revising their laws in an effort to comply with resolution 1373 and the pace at which States now become parties to the existing international conventions[32]. Moreover, partly as a result of the CTC's outreach to more than 60

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[28] See generally: UN Doc. S/2004/255 (29 March 2004).

[29] UN Doc. S/2003/789 (31 July 2003); see also: UN Doc. S/2004/226 (29 March 2004), UN Doc. S/2004/684(25 Aug. 2004), UN Doc. S/2004/854 (26 Oct. 2004) and UN Doc. S/2003/1173 (15 Dec. 2003).

[30] See: Gehr, W., Recurrent Issues, (April 4 2002) .

[31] Over 150 UN members had reported by mid-2004 to the UN Counter Terrorism Committee on the measures that they have taken to implement S.C. Res. 1373.

[32] Prior to 9/11, only Botswana and the United Kingdom were parties to all the UN terrorism conventions. Since then, an additional 39 States have become parties to all of them. The Terrorist Bombings Convention has seen a 71% increase and the Terrorist Financing Convention has seen a 94% increase in their respective ratification and accession rates since 2001. See: Statement of the CTC's Chairman. UN Doc. S/PV.4792 (2001), p.p. 2-3.

organisations, a broad range of international institutions and regional organisations have adopted counter-terrorism programmes[33]. Thus, the Committee has become the focal point of a global long-term effort to combat terrorism. Such a global mechanism did not exist prior to September 2001. Some observers have commented that the Committee's work is rapidly emerging into 'minimum international standards for counter-terrorism law[34]. However, the most significant challenge for the counter-terrorism committee is its ability to help built the capacity of states to protect and safeguard human rights which combating terrorism[35]. The ability of the counter-terrorism committee to monitor the implementation of resolution 1373 may be improved by the resolution 1535, which set up the Counter-Terrorism Executive Directorate.

Despite the prominent role of the CTC it should be not be forgotten that is only an instrument to monitor the implementation of resolution 1373. It is not a sanctions committee and does not have a list of terrorist organizations or individuals. It is not empowered to sanction noncompliant countries. The main sources of information for CTC are the state reports, with no effective mechanism to generate alternative information.

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[33] The Organisation for Security and Co-operation in Europe (OSCE) ended its 10th Ministerial conference by adopting a resolution and Charter on preventing and combating terrorism and agreeing guidelines to meet new challenges to security (7 Dec. 2002), available at: http://www.osce.org/docs/english/1990-1999/mcs/10porto02e.pdf. See also, OSCE Decision No. 617 on Further Measures to Suppress Terrorist Financing, OSCE Doc. PC.DEC/617 (1 July 2004).

[34] Zagaris, B., The merging of international terrorist and money laundering policy, *International Enforcement Law Report*, (April 2002), p.39.

[35] The UN Office of High Commissioner for Human Rights has exchanged views with the committee with regards to the issue of respect for human rights. See relatively: www.un.org/docs/sc/committees/1373/

4. JURISDICTIONAL CONFLICTS REGARDING THE ENFORCEMENT OF RESOLUTION 1373: CONFLICTING UNILATERAL INTERNAL MODELS

Although the CTC's co-ordination of the implementation of international sanctions has had significant impact in exposing and restricting various aspects of terrorist financing, having moreover fostered a degree of co-operation among States in addressing terrorism, the ultimate effectiveness of such sanctions will depend on the ability of national authorities to enforce them. Indeed, national authorities must ensure that ecomonic sanctions and Know Your Client (KYC) requirements – addressed to financial institutions - are not evaded by multi-national holding companies composed of shell corporations. Moreover, although each member State is permitted to implement and enforce sanctions according to its own legal principles, there does not exist a fair degree of commonality in how authorities define civil and criminal liability for breaching sanctions laws.

When the question turns, however, to abstract legal entities, States will necessarily be worried that an uncontrolled and centralized sanctions regime might have an impact on their economy. Targeted entities should, therefore, be endowed with basic protections against having their assets frozen without due process of law. When one country's legal authorities violate such protections, other national authorities often become reluctant to coordinate transnational enforcement efforts. Moreover, issues of extraterritorial jurisdiction and third party liability may take on different dimensions in different legal systems, thus preventing the efficient implementation of international sanctions. It is, thus, evident that there is some space for the unilateral internal approach on two grounds: a) the first is *de jure*. Resolution 1373 provides States with the freedom to implement the anti-terrorist financing terms of the Resolution in their domestic order, while; b) the *de facto* dimension of the Resolution suggests that States will be reluctant to implement the wishes of other States urging for particular sanctions where the requested State has reason to doubt the accuracy of the accusation. In both cases, the unilateral internal approach possesses a particular inherent dynamic, in that where there exists a conflict with the request of another jurisdiction, the requested State has a legitimate authority to refuse compliance – unless of course the request comes from the Security Council, or any of its subsidiary bodies. This, however, may become very problematic since the Council has not issued resolutions every time a legal

entity has been accused of terrorist financing, but has instead: a) either relied on evidence brought to it by member States, which was then passed over to its subsidiary bodies for further circulation to member States, or; b) relied on the inter-State co-operation provision contained in Resolution 1373, on the basis of which States are under an obligation to cooperate in the enforcement of terrorist financing. While the former has a binding dimension because of the grounding of the relevant obligation in the UN Charter, the obligation to co-operate in Resolution 1373 does not envisage that any and all requests to freeze must be religiously adhered by all other States. This inter-State co-operation approach contained in Resolution 1373, therefore, requires good faith and reciprocity and does not therefore have the force of bilateral or multilateral co-operation treaties, despite its insertion in a Security Council resolution.

As already mentioned, Resolution 1373 requires member States to freeze all the assets of designated terrorist groups and entities supporting them. Because the method of designating terrorist groups varies from State to State and the legal principles by which financial sanctions are imposed varies accordingly, differences arise concerning the extent that financial sanctions are to be imposed. The system of designating terrorist groups varies between States and is often based on intelligence derived from covert operations, which ordinarily cannot be divulged in judicial or tribunal proceedings. As a consequence, the CTC has failed to apply uniform standards in these areas, and because it has required States to recognize the freeze orders of other States directed at particular individuals, dispute has arisen among member States with respect to whether such orders should be given mutual respect if issued without adherence to basic human rights or due process of law. The Swedish and French governments raised these issues with the Security Council in January 2002 in a case involving whether they were obliged to recognise certain freeze orders originating from the US Government Office of Foreign Assets Control (OFAC), with respect to three Somali-born Swedish citizens whom the US had designated as terrorists after the events of 9/11. The US had transmitted its list of terrorist financiers to

the Security Council, which later required that member States freeze the assets of the alleged terrorists. The Swedish government froze the accounts of the suspected terrorists who were claiming that they were transferring money to their families in Somalia. Both the Swedish and the French governments intervened by urging the Security Council to review its sanctions list[36]. We can only speculate that similar incidents have been settled at a diplomatic level, because judicial proceedings with respect to such matters would only focus on the legality of freeze order and the nature of the assets, but not whether the requested government was under an obligation to adhere to the cooperation provision of Resolution 1373.

In this context, it is interesting to see how the United States itself has made use of the authority granted under Resolution 1373 to employ the unilateral internal approach. Prior to 9/11 the USA had not ratified the 1999 Terrorist Financing Convention. Nonetheless, US reaction was such that the government provided criminal and civil enforcement with all necessary power to investigate terrorism beyond regular legal confines[37]. This policy commitment was later translated into legal action and entails two principal initiatives, both of which have significant implications outside of the United States. Executive Order 13224 of 24 September 2001, entitled 'Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit or Support Terrorism' and 'The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act' 2001 (the Patriot Act).

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[36] The US government has opposed the Swedish and the French government request. See relatively: Schmemann, S., Swedes take up the cause on the US terror list, *New York Times* (26 Jan. 2002), p. A7.

[37]See: President George W. Bush, State of the Union Speech' January 29, 2002, available at: http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html, stating, 'We will ... bring terrorists to justice'; Alexander, K., United States financial sanctions and international terrorism, 17 *Journal of International Banking and Financial Law (* 2002), p. 80.

The significance of the initiatives contained in the Patriot Act[38] is that they have an extra-territorial impact. The Patriot Act authorises the imposition of special measures against foreign jurisdictions and foreign financial institutions that are considered to pose a money laundering risk. These measures include: additional record keeping and reporting of financial transactions, identification of foreign owners of accounts at US financial institutions, requiring foreign banks to identify those customers who transfer funds through an account at a US financial institution and requiring foreign banks to identify those customers who use correspondent accounts opened by foreign banks at US banks[39]'. The overall effect of these measures is to require foreign banks doing business in the United States (and US banks with branches in other countries) to collect and disclose customer information to US authorities. If businesses outside the United States do not have effective systems and procedures in place to investigate money transfers and the verification of customer details, US institutions are prohibited by the Act from doing business with them. The Patriot Act also requires US authorities to encourage foreign governments to require the disclosure of information by their financial institutions to US authorities and to encourage foreign governments to adopt more effective financial regulation and supervision aimed at anti-money laundering. Since 9/11, the US government appealed to almost every government in the world asking for support in the 'war against terror', with particular reference to financial institutions.

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[38]USA Patriot Act 2001, title III, signed into law 26 October 2001, Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Public Law 107-197, Title II, §202(a), June 25, 2002, 116 Stat. 724, amended by Public Law 107-273, Div. B, Title IV, § 4006, November 2, 2002, 116 Stat. 1813 (18 U.S.C. §2339C). Other, for example, legislative acts that have passed in the United States include: The Intelligence Authorization Act for Fiscal Year 2002, H.R. 2883, 107th Cong. (enacted 2001); Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. (enacted 2001 and Aviation and Transportation Security Act, S. 1447, 107th Cong. (enacted 2001); See Rause, A., USA Patriot Act: anti-money laundering and terrorist financing legislation in the U.S. and Europe since September 11, 11 *ICLQ* (2003), p. 173.

[39] Alexander, supra note 36, at p. 83.

On 24 September 2001, in the aftermath of 9/11, President Bush issued Executive Order 13224[40], which expanded US power to target the support structure of terrorist organizations. By recognising that the most significant weapon in any terrorist operation is money, it increased law enforcement's ability to freeze US-based assets, as well as block the US transactions of terrorists and those that support them[41]. Additionally, it heightened US ability to block US-based assets of foreign banks. It also enabled the United States to deny foreign banks access to US markets if they refuse to cooperate with American authorities by identifying and freezing terrorist resources abroad. This laid the groundwork for the international actions that followed to block and freeze terrorist assets globally. The order is a significant extension of extra-territorial third party liability for foreign banks, companies and individuals who conduct, or assist transactions involving US designated terrorist organisations[42]. These efforts have met with considerable success[43]. Working bilaterally and multilaterally, the United States has succeeded in freezing terrorist assets in over 165 countries. By late 2002, more than $112 million in terrorist assets had been frozen worldwide in over 500 accounts and more than $34 million of these assets were frozen in the United States, while over $78 million were frozen overseas[44].

Other countries have adapted their domestic legislation and have frozen foreign assets on their territory where they found good cause to do so[45], but with the exception of the UK they did not impose the

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[40] US Dept of the Treasury, Terrorism: What You Need to Know About US Sanctions (6/6/2003) – available at: http:/ www.rbnz.govt.nz/research/bulletin/ 2002_2006/2003sep66_3matthews.pdf.

[41] Sec. 1(b), (c).

[42] Executive order 13224, preamble (24 September 2001)

[43] As of November 2002, 251 individual organizations had been designated under Executive Order 13224 as financial supporters of terrorism. See: Treasury Department, Contributions by the Department of the Treasury to the Financial War on terrorism-Fact Sheet, September 2002, available at: http: www.house.gov/pombo/911factsheetsFINAL.

[44] Ibid.

[45] For example, France in implementing the 1999 Terrorist Financing Convention formulated new procedures for lifting bank secrecy and freezing funds. See, UN Doc. S/2001/1274 (16 Nov. 2001) at p. 18. See also, UN Doc. S/2001/1270 (2001); Human Rights Watch (HRW) Report, Indian Prevention of Terrorism Ordinance. On October 16, 2001 the Indian cabinet approved the Prevention of Terrorism Ordinance. The new Law enacts a broad

findings of their law enforcement agencies upon other countries in the same manner as the USA. The UK has swiftly enacted anti-terrorist financing legislation following the events of 9/11[46] and through the 2000 Act, which deals exclusively with offences committed abroad and recognises that terrorist operations cannot be carried out by a single individual, the UK had by late 2002 frozen the assets of over 100 organisations and over 200 individuals[47]. It is true, however, that despite extra-territorial action by the UK, this has not translated in the form of explicit pressure imposed by the United States on a unilateral basis. There is certainly an uneasy tension in the application of the unilateral internal approach from the part of the United States and as far as this concerns forceful co-operation. Although most developed countries have voiced their concerns over such unilateral action, the vast majority of developing countries have accepted the US position and there is no evidence of dissention or accusation in their reports to the CTC. Nonetheless, the French reaction noted above indicates that most developed countries are weary of such forms of intrusion against their sovereignty and it is unlikely in the near future for the Security Council to adopt resolutions condemning particular organisations or individuals where there does not exist consensus among the five permanent members on the liability of listed persons and organisations.

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definition of terrorism that includes acts of violence or disruption of essential services carried out with 'intent to threaten the unity and integrity of India or to strike terror in any part of the people'. It also criminalizes failure to provide authorities with 'information relating to any terrorist activity'. [Prevention of Terrorism Bill 2000 [draft; Law Commission of India Report, April 2000]; similarly, Cyprus: A Law to Ratify the International Convention for the Suppression of the Financing of Terrorism, including supplementary provisions for the immediate implementation of the Convention, No. 29 (III) of 2001. Finally, Canada: Anti-terrorism Act, Statutes of Canada 2001, Chp. 41; Proceeds of Crime (Money Laundering) and Terrorist Financing Act Statutes of Canada 2000, Chp. 17.

[46]This revoked the earlier Afghanistan (United Nations Sanctions) Order 2001, which had implemented S.C. Res. 1267 (Taleban) and 1333 (Bin Laden and the Taleban). See also: Katselli, E., and Shah, S., September 11 and the UK response, 52 *ICLQ* (2003), p. 245. See also: Britain's Anti-Terrorism, Crime and Security Act, 2001, c. 24, available at: http://www.legislation.hmso.gov.uk/acts/2001. For commentary, see: Henning, V., Anti-Terrorism, Crime and Security Act 2001: has the United Kingdom made a valid derogation from the European Convention on Human Rights? 17 *American University International Law Review* (2002), p. 1263.

[47]Terrorism (United Nations Measures) Order 2001 and the Al Qaeda and Taliban (United Nations Measures) Order 2002.

5. THE EXTRADITION/UNLAWFUL RENDITION MODEL

Article 11 of the Terrorist Bombings Convention obliges member States to sever the link between the offences described in Article 2 of the Convention from whatever ideological justifications, thus removing any obstacles stemming from extradition or mutual legal assistance (MLA) requests. The same is true with regard to all post-9/11 Security Council resolutions. Article 9 of the Convention further obliges parties to treat said offences as extraditable and describe them as such in bilateral extradition treaties. Extradition treaties deal with extraditable offences in one of two ways. The first approach, which may be referred to as the 'enumerative method', is to list specifically in the treaty those offences for which extradition may be granted as between the parties thereto[48]. This method became the standard international form in the late 19th century and is still employed in many existing treaties. Thus, for example the 1972 Extradition Treaty between the United States and Argentina lists approximately 30 substantive offences, which are extraditable within the meaning of that instrument as long as they are punishable by the laws of each party by imprisonment of at least one year[49]. With respect to such treaties, this provision has the effect of adding the offence of terrorist bombing to the specifically listed offences. It is with respect to this type of treaty that this provision is of most relevance. The second and most modern approach[50], which may be referred to as the 'eliminative method' is for the treaty to define extraditable offences as all offences which are punishable by both parties on the basis of a particular penalty i.e. imprisonment. Thus, this type of treaty dispenses with the need for a specific list of offences. For example, Article 2 of the 1982 Extradition Treaty between

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[48] Bassiouni, C. M., *International extradition: United States law and practice* (Oceana, 1996); Bantekas and Nash, supra note 36, p. p. 179-185.

[49] Art. 2, 1972 US-Argentina Extradition Treaty, TIAS 7510. The enumerative method has been predominent in US practice. See: Whiteman, M., *Digest of international law*, (vol.6, Government Printing Office, 1968), p.p. 772-73. However, this apprears to have been changing from the late 1970's. See: Stanbrook, I., and Stanbrook, C., *The law and practice of extradition*, (Oxford University Press, 2000), pp. 8-9.

[50] See: US Senate Committee on Foreign Relations, Report on the extradition treaty with Italy, 98th Cong, 2nd session, reprinted in 24 *ILM* (1985), 1531.

the USA and Italy states that any offence shall be deemed extraditable only if it is punishable under the laws of both contacting parties[51]. Similarly, the 1957 European Convention on Extradition provides in Article 2 that extraditable offences are those which are punishable under the laws of the requested and the requesting State by deprivation of liberty for a maximum period of at least one year or a more severe penalty[52].

Since the attacks of 9/11 the traditional approach whereby extradition was regulated at the inter-State level with a plethora of safeguards for the accused seems to have changed[53]. Increased use of diplomatic assurances has been employed to justify extradition to countries that are known to systematically engage in torture. Requested States rely more and more on verbal assurances and very occasionally agree on a monitoring mechanism, usually involving visits by diplomatic representatives[54]. In the *KK Mohamed* case, the South African Constitutional Court found that Mohamed's transfer to the USA without assurance regarding the infliction of the death penalty and other cruel treatment violated his pertinent rights[55]. Mohamed was indicted for his alleged involvement in the terrorist bombing of the US Embassies in Nairobi and Dar Es Salam in 1998. He was a Tanzanian national who later fled to RSA shortly after the bombing where he sought asylum. He was arrested after interrogation by RSA authorities on the basis of a warrant issued by Federal District Court of New York and flown to the USA. Although it is unclear whether Mohamed's transfer was a

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[51] 1983 USA – Italy Extradition Treaty, *TIAS* 10, 837.

[52] 359 *UNTS* 276.

[53] Extradition as a tool to counter-terrorism is discussed also in chapter one of the present thesis. However, the issue is further explored within the present chapter in order to demonstrate how the events of September 11 challenged the traditional approach to extradition.

[54] Human Rights Watch (HRW) Report, Empty Promises: Diplomatic Assurances No Safeguard against Torture (April 2004), vol. 16, No. 4(D), available at: http://www.hrw.org/reports/2004/un0404/diplomatic0404.pdf.

[55] Mohamed and Another v President of RSA and Others, (3) SA 893 (2001) (CC).

deportation or disguised extradition, the RSA Supreme Court criticised and concerned itself with the lack of assurances, citing similar procedural failures on the part of Germany during the same period[56].

Thus, recent extradition practice with regard to alleged terrorist bombers suggests that the human rights provisions in the 1998 Convention, particularly Article 14, are weighed against the perceived terrorist threat. This is significant since the human rights component of extradition signifies the flexibility of States as regards the unilateral domestic and the inter-State suppressionist model. Where States are under pressure, political or otherwise, to extradite absent human rights assurances, the aforementioned models may be deemed to depend less on unilateral State freedom of action. This trend is exemplified in other recent cases and concerns to a large degree the wilful neglect of the discrimination clause found in Article 12 of the 1998 Convention[57]. An appeal is currently pending before the Grand Chamber of the ECHR in *Mamatkulov and Askarov v Turkey*, regarding the extradition of Uzbek nationals from Turkey to Uzbekistan on suspicion of involvement in terrorist bombings[58]. The ECHR's First Chamber initially supported the extradition having relied on diplomatic assurances that the accused would not be subjected to torture or the death penalty, notwithstanding well-documented

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[56] Redress Report, Terrorism, Counter-Terrorism and Torture (July 2004), p. 32.

[57] The discrimination clause is widely found in other instruments, such as Art. 3(2), 1957 European Convention on Extradition; Art. 4(5), 1981 Inter-American Convention on Extradtion; Art. 5, 1977 European Convention for the Suppression of Terrorism. Moreover, discrimination clauses, while not as widespread as the political offence exception, can be found in various forms in the domestic laws of most States, such as the 1967 Netherlands Extradition Act and the 1957 Swedish Extradition Act. It is also encountered in numerous bilateral extradition treaties, such as the 1976 UK-Finland Extradition Treaty, 23 *UKTS* (1977), as modified in 1985. Reprinted in 24 *ILM* (1985), 1257. In its early form, the discrimination clause seems to have been concerned only with 'disguised' requests for extradition, i.e. those requests which were formulated in terms of a common crime but which were, in fact, designed to obtain custody of the alleged offender and prosecute him for a political crime or purpose. As drafted in this and other more recent instruments, however, such clauses seek to protect those persons whose positions would be prejudiced because of political or ideological reasons.

[58] ECtHR Appeal Nos. 46827/99 and 4695/99.

evidence that Uzbekistan systematically subjected Muslims and members of the Erk political party, as were the accused, to torture[59].

In November 2001, the Court of Appeal in Vienna ordered the extradition to Egypt of Mohamed Bilasi-Ashri, who had been sentenced *in absentia* in Egypt for alleged involvement in an Islamic extremist group[60]. Although the Vienna Court considered the accused's plea that he risked torture and ill-treatment upon his return, it surprisingly concluded that 'Egypt was not a country where serious large scale violations of human rights could be considered an institutionalised every day practice', thus finding no obstacle to his extradition[61]. The interesting element in this case is the involvement of the Austrian government – in particular the Austrian Federal Minister of Justice - through its acceptance of diplomatic assurances by the Egyptian authorities that the accused's conviction in absentia would be nullified, that he would be tried before civilian courts and that he would suffer no adverse discrimination, notwithstanding reports of 'widespread evidence of torture by the [Egyptian] State Security Investigation Department'[62]. Although the accused was released because the Egyptian authorities finally rejected the conditions laid out in the extradition order, the Austrian government's disregard of these reports regarding torture in Egypt is instructive of the way the inter-State model has eroded domestic human rights concerns in the field of terrorism.

In some cases, however, the courts take a more proactive stance and serve to deter liberal government attitudes to extradition[63]. In a recent case, Bow Street Magistrate's court in the UK rejected a request

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[59]Report of the Special Rapporteur on Torture, Mission to Uzbekistan, UN Doc. E/CN.4/2003/68/Add.2 (3 Feb. 2003).

[60] Redress, supra note 54, at pp. 33-34.

[61] Ibid.

[62] Committee Against Torture (CAT) Conclusions and Recommendations: Egypt (23 Dec. 2002), CAT Doc. CAT/C/CR/29/4, para. 5; see also, Concluding Observations: Egypt (17 May 1999), CAT Doc. A/54/44, para. 4.

[63] *Rasul v. Bush* and *Al-Odah v. United States*, 542 US (2004) delivered by the US Supreme Court on 28 June 2004, on the basis of which US courts have jurisdiction to examine habeas corpus petitions of foreign nationals

from Russia to extradite two men suspected of having committed crimes in Chechnya. Despite diplomatic assurances that the men would not be tortured, the court was not convinced[64]. Similarly, a German court refused extradition to Turkey in the case *Metin Kaplan*, the leader of a banned Islamist fundamentalist group[65]. The USA itself has adopted equivalent measures for its own citizens, without however extraditing them to other countries. It has labelled them as enemy combatants not entitled to the traditional protections of the US Constitution[66]. One of these US citizens, Jose Padilla, was alleged to have been involved in a plot to detonate a radiological device in the United States[67].

I shall conclude this section with a more detailed examination of the post-9/11 practice of unlawful rendition. The notion of 'renditions' involves the transfer of persons inter-State through unlawful means, such as forceful transfers not involving extradition, expulsion or deportation procedures[68]. Whereas the official practice of the majority of States until the late 1980's outlawed unlawful renditions, the situation was reversed in the early 1990's by actions of the executive[69] as well as the judiciary[70]. The trend is particularly evident in the practice of the USA and whereas it was formerly

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captured abroad. See also A (FC) and Others (FC) v. Secretary of State for the Home Department, [2004] *UKHL* 56, where the House of Lords held that indefinite imprisonment without trial or charge violated fundamental human rights.

[64] Government of the Russian Federation v Akhmed Zakaev, Bow Street Magistrate's Court, Decision of 13 Nov. 2003 (Hon. T. Workman).

[65] Kaplan 4 Aus (a) 308/02-147.203-204.03111 (27 May 2003).

[66] Hamdi v Rumsfeld, 316 F. 3d 450 (4th Cir. 2003); Padilla ex rel. Newman v Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[67] Padilla case, ibid, at p. p. 572-73.

[68] Fitzpatrick, J., Rendition and transfer in the war against terrorism: Guantanamo and beyond, 25 *Loy. LA Int'l & Comp. L. Rev* (2003), p. 457.

[69] 'Extraterritorial Apprehension by the FBI', 4B, *Op. Off. Legal Counsel* (US Dept. Justice) 543 (1980). This noted that such renditions violated customary international law because they involved violation of another country's sovereignty. This Opinion was repudiated in 1989. See: 'Override International Law in Extraterritorial Law Activities', 13 *Op. Off. Legal Counsel* (US Dept. Justice) 163 (1989).

[70] United States v. Alvarez Machain, 504 US 655, 657 (1992).

confined to transnational crime[71] it is now employed in the war against terror. Recent reports indicate that since the events of 9/11 over 3,000 individuals have been subjected to forceful inter-State transfers to detention facilities in known or undisclosed locations, with the method of transfer involving unlawful means[72]. Persons who had no involvement in the war in Afghanistan but were caught in the greater global war against terrorism and suspected for their involvement in terrorist acts have been detained to undisclosed locations or sent to States with a dubious human rights record. Those falling within this group have been transferred under a policy described as 'renditions' or 'extraordinary renditions'[73]. Following 9/11 the practice of renditions has become much more widespread and individuals have been rendered to countries such as Egypt and Jordan where the sending authorities are well informed that the receiving State will employ torture to exact information from alleged terrorists[74]. A recent example of such practice concerns the case of *Maher Arar*, a dual Canadian/Syrian national who was detained at JFK airport in New York while on transit to Canada. He was held incommunicado in the USA for a period of two weeks and then flown to Syria and Jordan where he spent ten months in detention and allegedly tortured. The US government claims to have relied on assurances by Syria, but the fact remains that he was not charged with any offence at the time of rendition, nor was he subject to any legal process in the USA or elsewhere[75]. Following his release, Mr. Arar filed a complaint in the New York District Court alleging that US authorities handed him over to Syria because the torture employed against him in Syria would have been unlawful in the USA – citing, for example, that

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[71] Choo, A., International kidnapping, disguised extradition and abuse of process, 57 *MLR* (1994), p. 626; Warbrick, C., Judicial jurisdiction and abuse of process, 49 *ICLQ* (2000), p. 489.

[72] President Bush, State of the Union Address 2003, available at: http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

[73] Redress Report, supra note 54, at pp. 36-37.

[74] Ibid.

[75] Amnesty International Report, *USA: the threat of a bad example – undermining international standards as the war on terror detentions continue*, (15 Aug. 2003), available at: http://web.amnesty.org/library/Index/EngAMR511142003.

questions posed to him in both countries were identical[76]. In an interesting twist to the story, for the purposes of this thesis, it was discovered that Canadian officials had facilitated Arar's unlawful rendition to Syria by providing intelligence to their US counterparts[77]. Similarly, in January 2002, five Algerians and a Yemeni were apprehended by US forces in Bosnia and flown to a US detention centre in Guantanamo Bay in contravention of an injunction by the Bosnian Human Rights Chamber that they remain in the country until such time as their cases are determined. The Chamber declared the hand-over to the US illegal and in breach of the obligations of the government of Bosnia and Herzegovina under the ECHR and the Dayton Peace Agreement[78]. Numerous other cases have surfaced since 2002, involving unlawful renditions to countries such as Pakistan, Sudan, Malawi, Zimbabwe and others[79].

It is evident from my preceding analysis that contemporary extradition law relating to terrorism – and thus encompassing terrorist bombings as the most common form of terrorist activity – is premised on two levels of regulation: the written normative level, which may be termed 'surface law' and the real-life subsurface practice. Although enforcement of the latter is mostly achieved through clandestine operations it is generally accepted as official practice, but there is obviously no admission of torture or other human rights violations, even if torture constitutes a necessary component of such practice. This indicates a shift from the traditional unilateral internal model to a much more liberal inter-State suppressionist model that is increasingly distancing itself from human rights considerations by reference to international law and in particular pertinent Security Council resolutions.

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[76] Arar v Ashcroft et al, Complaint of Maher Arar, US District Court of New York, available at: http://ccr-ny.org/v2/legal/September_11th/docs/Ararcomplaint.pdf, at para. 1.

[77] The Canadian government established a Commission to inquire into these allegations. See: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, available at: http://www.ararcommission.ca/eng/.

[78] Boudellaa and Others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (11 Oct. 2002), Case Nos. CH/02/8679, CH/02/8689, CH/02/8690, CH/02/8691; Bensayah v Bosnia and Herzegovina (4 April 2003), Case No. CH/02/9499.

[79] See Amnesty Report, supra note 73; Redress Report, supra note 54, pp. 38-39.

6. EMERGING EU CO-OPERATION MODELS

Although the EU was concentrating in the fight against terrorism long before the September 11[80], it demonstrated a much more incisive strategy after that date[81]. Among the most recent instruments adopted to make the fight against terrorism more effective is EU Arrest Warrant[82], adopted within the Council's framework decision in 13 June 2002[83]. The Tampere European Council had called on EU member States to make the principle of 'mutual recognition' of criminal judgments the cornerstone of EU law enforcement. The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. It is designed to replace all extradition treaties among EU member States by requiring all national judicial authorities to recognize, automatically and without further qualifications, requests for the surrender of a person made by another national judicial authority. Unlike the existing extradition treaties, the EU Arrest Warrant does not involve any political approval, but renders the matter of extradition a concern for judicial authorities alone. Moreover, persons arrested under the Warrant cannot rely either on the double criminality or the specialty rule. This inapplicability of the double criminality rule is explicitly reserved for the offence of terrorism. Thus, in the EU context, the previous approach established under the anti-terrorist conventions and practice, whereby extradition was subject to cumbersome considerations such as the existence of double criminality, political offence exception, the nationality

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[80] See relatively: Venneman, N., Country report on the European Union, found in Voleky, S., *Terrosim as a challenge for national and international security versus liberty,* (Dpringer, 2004).

[81] Wouters, F., Terrorist offences and extradition deals: an appraisal of the EU main criminal law measures against terrorism after September 11, 41 *Common Market Law Review* (2004), p. p. 909-932.

[82] Council Framework Decision 2002/584/JHA (13 June 2002) on the European Arrest Warrant and the Surrender Procedures between Member States [OJ L 190, 18/07/2002].

[83] See: *OJEC* L 190, 18 July 2002.

principle, approval by the executive, and others are now gone. The new approach is based on good faith between EU member States and is a true reflection of the belief that serious crime, including terrorism, must not be made hostage to domestic concerns and that terrorism should be approached as a phenomenon. It is unlikely, however, that this approach will be imitated in other regions, let alone on the basis of a global instrument, because of the lack of good faith and uniformity in laws and institutions that one generally finds within the EU.

On a theoretical level, the introduction of a European Arrest Warrant[84] instead of traditional extradition reflects a genuine shift in legal co-operation between Member States. Traditionally, such co-operation is based on the rule that one State does not execute or enforce decisions of another State, unless otherwise agreed, e.g. in extradition treaties. In contrast, the European Arrest Warrant is based on the principle that Member States automatically recognize each other's judicial decisions ordering the arrest of a person[85].

The EU has been particularly active in the fight against terrorism, by adopting legislative mechanisms and by expanding its police and judicial co-operation[86]. The main lines of the EU activity were set out in the Action Plan adopted by the Extraordinary European Council of 21 September 2001 and in the conclusions of the Justice and Home Affairs Council[87]. Shortly after the events that took place in Madrid on 11 March 2004, the EU once again placed the fight against terrorism at the top of its agenda.

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[84] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, O.J. 2002, L 190/1.

[85] Peers, S., Mutual recognition and criminal law in the European Union: has the council got it wrong?, 41 *CML Rev.* (2004), p.p. 5-36.

[86]See generally: Fijnaut, Wouters and Naert (eds.), *Legal instruments in the fight against international terrorism. A transatlantic dialogue*, (Martinus Nijhoff, Leiden/Boston, 2004); Wouters and Naert, The European Union and 'September 11', 13 *Indiana Int.Comp.L.Rev.* (2003), p.p. 719-775; den Boer and Monar, 11 September and the challenge of global terrorism to the EU as a security actor, 40 *JCMS* (2002), p.p. 11-28; Peers, S., EU responses to terrorism, 52 *Int.Comp.L.Q.* (2003), p.p. 227-243.

[87]www.europa.eu.int/comm/justice_home/news/terrorism/doc.

While a number of new measures were proposed at the extraordinary JHA Council of 19 March 2004 and at the 25-26 March 2004 European Council, i.e. the appointment of a Counter-terrorism Coordinator and the adoption of a declaration on combating terrorism and on solidarity against terrorism, and while the 2001 Action Plan is being revised[88], it has become clear that what is needed most in the area of JHA is the implementation of policies and instruments that have been already agreed upon. The EU's Terrorism Framework Decision has likewise been exceptionally swift[89]. The Terrorism Framework Decision approximates the Member States' definitions of terrorism and obliges them to criminalize terrorist offences thus approximated (Art. 1), including directing or participating in a terrorist group (Art. 2), as well as linked offences (Art. 3) and inciting, aiding and abetting and attempting terrorist offences (Art. 4). It obliges the Member States to ensure that legal persons can be held liable for these offences (Art. 7) and are subject to 'effective, proportionate and dissuasive penalties', of which it gives some examples (Art. 8). Furthermore, it sets standards for the penalties to be imposed ('effective, proportionate and dissuasive criminal penalties, which may entail extradition'), including minimum levels for some maximum penalties (Art. 5). It also establishes jurisdictional rules (Art. 9). Finally, it contains rules concerning reduced penalties for terrorists who renounce terrorism and cooperate with the authorities to prevent or combat it (Art. 6) and relating to protecting and assisting victims of terrorist offences (Art. 10). Likewise, the EU has a set of legislative mechanisms that facilitate the arrest and handover of terrorists, categorization and penalization aimed at combating terrorist crimes and the seizure of terrorist goods and evidence. Although these measures make it

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[88] See respectively points 14 and 2 of the Declaration on Combating Terrorism and the Declaration on Solidarity against Terrorism adopted by this European Council.

[89] The Commission submitted the proposal for the TFD on 19 September 2001 (COM (2001) 521, O.J. 2001, C 332/E/300). At its meeting on 6-7 December 2001, the JHA Council reached a provisional political agreement, subject to renewed consultation of the European Parliament and to some parliamentary scrutiny reservations (Doc. 14845/1/01 REV 1). The Parliament had, after its first consultation, proposed numerous amendments and had called for renewed consultations in the event that substantial changes were envisaged (Legislative Res., 29 Nov. 2001, O.J. 2002, C 153/E/275, and the corresponding Report (A5-0397/2001)). After being consulted again, it consented with the Council's draft without amendment on 6 February 2002 (Legislative Res., O.J. 15).

possible to work towards a common legislative framework they cannot hide the difficulties involved in the process of negotiations, harmonization and effective implementation in such a complicated context[90].

Thus, the fight against terrorism is on a double track: first, there is the internal, counter-terrorist dimension within the EU; then there is the external, anti-terrorist dimension in which the EU has begun to play a global role. In the first case, the headway mentioned above is complemented by the possibilities opened to external border control as established by the Schengen Agreement. The elimination of interior borders has created the need for increased control regarding the flow of people and goods across the external borders of the EU. This responsibility is in national hands but increasingly requires more supranational support and coordination –a need that has led the Commission to call for the establishment of a European co-ordination agency. In the second case, co-operation with other countries and regional organizations has enhanced the international profile of the EU's internal security. Cooperation with third parties is accomplished by including standardized anti-terrorist clauses in bilateral agreements, offering technical assistance to countries affected by terrorism and to new members joining the EU, and by making joint declarations, agreements on the exchange of information and legal assistance[91], as well as by concluding extradition agreements with third parties.

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[90] Moreover, there are now agreements between the EU and the US. See relatively: Dubois, S., The attacks of 11 September: EU-US cooperation in the field of Justice and Home Affairs, 7 *Eur.For.Af.Rev.* (2002), p.p. 317-335.

[91] See especially the Europol-US agreements of 11 Dec. 2001 (Doc. 13359/01) and 20 Dec. 2002 (Doc.15231/02); Mitsilegas, K., The new EU-USA cooperation on extradition, mutual legal assistance and the exchange of police data, 8 *Eur.For.Af.Rev.* (2003), p.p. 515-523 and Peers, S., Analysis of the supplementary agreement between Europol and United States, 15 *Statewatch analysis* (2002), at; http://www.statewatch.org/news/2002/nov/analy15.pdf.

7. THE COUNCIL OF EUROPE COUNTER-TERRORISM MEASURES

Further evidence of the impact of September 11 and the determination of the European states to effectively fight terrorism can be found in the activities of the Council of Europe, which replaced its previous sectorial approach with a more comprehensive approach. Among the priorities of the Council of Europe counter-terrorism action are the 'multidisciplinary group for international action against terrorism, GMT, which drafted the protocol amending the 1977 European convention for the suppression of terrorism in 7 November 2002. The major innovations introduced by the Protocol is the fact that it establishes a wider list of offences into the scope of the convention, a mechanism for monitoring the implementation of the convention, the grounds for refusal of extradition. The list of conducts which may be considered as political offences for the purpose of refusing extradition has been updated by introducing the ten UN thematic conventions which provide for criminalization obligations.

More importantly article 5 provides that there is no obligation to extradite to countries where a person risks being subjected to death penalty, torture, or inhuman treatment, unless the requesting. In comparison to the 1977 European Convention for the Suppression of Terrorism, the 2003 amending protocol represents a step forward in facilitating extradition. However, the different legal systems between member states of the Council of Europe do not seem to add much in overcoming the discretion of member states to improve assistance and cooperation between states.

The European Council adopted the revised EU plan of action on combating terrorism on 18 June 2004 clearly setting out the future tasks, and urging member states to fulfil their commitments within the

established deadlines[92]. More specifically the European Union called on members to implement the framework decision on the European Arrest Warrant. However, the conditions under which a warrant may be issued are left to national legislation. Likewise, the warrant might lead to lower standards of justice and less protection of fundamental rights. To begin with, the fact that the offences listed are not defined has been criticized as well as the principles of non-discrimination only appear in the preamble. The safeguards provided by the framework decision are indeed limited. Two safeguards, those regarding the procedure leading to the arrest and surrender of the wanted person when executing a European arrest warrant issued in another member state and those related to a possible violation of the wanted person's right in the issuing state. However, despite those safeguards found in article 11, 14 and 17 of the framework decision, failure to respect fundamental rights in the issuing state is not one of the substantial reasons for refusal to execute the warrant. Despite the fact that there are guarantees of a high level to be found in article 6 of the Treaty of the EU I suggest that in order to eliminate all uncertainty more guarantees both procedural and substantial are necessary.

The launch of institutionalisation process for co-operation throughout Europe involved specific changes in the approach to the problem of terrorism. Member states do condemn all acts, methods and practices of terrorism as criminal, expressing their determination to fight the phenomenon through reinforced bilateral and multilateral cooperation.

7.1. FURTHER REGIONAL MEASURES

The countries of Western Hemisphere in their effort to combat terrorism at the regional level have sought to establish legal regimes. The main forum for taking counter-terrorism action at the regional level has been the organisation of American States. The 2002 OAS convention is a direct result of the

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[92] www. ue.eu.int.

attacks of 9/11 against the US. The main points of the convention are the ones dealing with international co-operation, the suppression of the financing of terrorism, exchange of information, technical co-operation and mutual legal assistance. The convention contains in article 11 a depoliticization provision. Thus, for the purposes of extradition and mutual legal assistance none of the offences under the convention may be regarded as a political offence. This is a remarkable departure from previous Inter-American conventions. Similarly the League of Arab States, adopted on 22 April 1998, maximised the level of co-operation among its members in the field of combating terrorism. An important aspect of the convention is the fact that it deals with issues of finance of terrorism and transborder control of lethal materials. Article 3 prohibits the finance of terrorism in all its forms. The adoption of the convention presents an outstanding example for regional legal co-operation in combating terrorism and it demonstrates the will to combat the terrorism phenomenon, irrespectively of any ideological or political considerations.

CONCLUSION

On 28 September 2001 the Security Council adopted Resolution 1373, taking unprecedented action to crack down on international terrorism. The resolution required every country to freeze the financial assets of terrorists and their supporters, deny travel or safe haven for terrorists, prevent terrorist recruitment and weapons supply, and co-operate with other countries in information sharing and criminal prosecution.

The procedures established under Resolution 1373 go far beyond what was envisaged under the terms of 1998 Bombing Convention. Whereas many States were reluctant to ratify this treaty, all States are now subject to rigid obligations. It is clear that the current approach in the context of exchange of information and other forms of mutual legal assistance is different from the approach in the field of extradition. In the former, the regime established under relevant Security Council resolutions is much more externally centralised and controlled, whereas in the extradition field it is not. Similarly, in the field of MLA States have a lot less control over the treatment of their intelligence and their choice of cooperative means and partners. The same could be said for extradition, although from a practical point of view, it is extremely burdensome to monitor extradition in the same manner. I have demonstrated, however, in what way there has been a shift since 9/11 in the processes employed by many developed

States in extraditing suspected terrorists to countries with appalling human rights records. These illegal renditions are not isolated phenomena that are refuted by governments, but for many countries form the backbone of their practice in their global fight against terrorism. Although reflective of State practice, its recent growth precludes us from making a value judgment regarding its normative content (i.e. instant custom). I shall simply say that it is indicative of an emerging model whereby focus on a particular obligation to the expense of another, although the two are by no means mutually exclusive. This paradigmatic shift is therefore problematic because it recognises the existence of two mutually exclusive legal regimes and hence operates on the basis that the global fight against terrorism can be effectuated only by abandoning the human rights component (or regime)[93].

With regards to the role of the Counter-terrorism Committee it becomes obvious that it can have a direct impact on the fight against terrorism, since it has helped energise states and organisations to pay more attention to combating terrorism. As a result of 600 reports it has received from states detailing their efforts to implement their obligations under resolution 1373, it is conducting the first worldwide audit of states' counter-terrorism capacities and it has also assumed a central role in the facilitation of technical assistance to states identified donors and interested states and helping to minimise duplication and overlap among potential assistance providers. The Committee has served as a 'switchboard', matching countries in need of assistance with those capable of providing such support[94]. The Committee has operated with unique openness and transparency, and has an extensive website reporting on CTC activities and offering assistance and services to member states and regional

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[93] See: Judgement concerning the Legality of the General Security Services's Interrogation Methods, Supreme Court of Israel, Judgement (6 Sep. 1999), 38 *ILM* (1999), 1471, which had to deal, inter alia, with the 'ticking time bomb exception', i.e. whether in cases of extreme necessity torture to extract evidence is permissible. The Court declared that while the relevant prohibitions were absolute, a 'necessity defence' could be raised in the ticking bomb scenario where an act is imminent to prevent danger that is certain to materialise, paras. 34-36.

[94] Rostow, N., Before and after: the changed UN response to terrorism since September 11, 35 *Cornell I. L. J.* (2002), p. 485.

organizations[95]. Compliance with CTC reporting requirements has been extraordinary, far greater than for any previous Security Council mandate. All 191 UN member states submitted first-round reports to the CTC explaining their efforts to comply with Resolution 1373[96]. Most states have also submitted second- and third-round reports. This high level of member state response indicates the importance many attach to compliance with the UN counter-terrorism program. The reports show that many states are taking concrete steps to revise their laws and enhance their enforcement capacity for compliance with UN counter-terrorism mandates.

The major challenge however, for the Counter-Terrorism Committee is to strike a balance between efforts to combat terrorism and the protection of human rights. There is the concern that implementation of 1373 not be used as an excuse to infringe upon human rights. Highlighting this issue one commentator has written that resolution 1373 is now preserving opportunistic states with a ready formula for trampling upon the rights of political or other opponents in the name of the war on terrorism. For example the human rights committee has expressed concern about the negative effect that some domestic counter-terrorism measures may be having on asylum seekers and other foreigners[97]. The established legal process for co-operation appears to be systematically replaced by informal rendition that raises fundamental questions as to whether cooperation since September 11 is undermining international law enforcement. This selective approach raises doubts as to the value of the effort dedicated to enchasing the legal framework.

There is a challenge from the interplay between combating terrorism and the protection of human rights. There is the concern that resolution 1373 may be used as an excuse for human rights abuses.

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[95] See: UN Counter-Terrorism Committee website, http://www.un.org/Docs/sc/committees/1373/>

[96] Rosand, E., Current developments: Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism 97 *AJIL* (2003), p.337.

[97] See: Nesi, G., *International co-operation in counter-terrorism*, (Ashgate, 2006), p. 85.

There are however, recent developments that may help mitigate the concerns of some that the CTC is not focusing on states' obligations to respect human rights as they implement Security Council counter-terrorism measures. The decision of the Security Council to authorise the Counter-terrorism Executive Directorate to hire a dedicated human rights expert and the decision of the Commission on Human Rights in April 2005 to approve the appointment of the special Rapporteur on human rights and terrorism are two steps forward.

Underlying all this activity—the reporting of states, the categorization of responses, the ratification of conventions, and the provision of technical assistance—is a steadily increasing level of international cooperation in the counter-terrorism campaign. A majority of UN member states are now working together to coordinate international law enforcement efforts, and to deny financing and safe haven to terrorists.

CONCLUSION

My aim when writing this thesis was to examine the various forms of action and co-operation among States in their fight against terrorism. This would then lead me to ascertain the formation of co-operative or unilateral models and delineate their precise content and spatial duration. While such models are, from the part of States, premised on political considerations, they are part of a hypostatic union that combines elements of both politics and law. If law was not a necessary ingredient of such models, then each paradigmatic shift would be arbitrary and outside any normative framework. I have attempted to identify practices that are hailed as paradigmatic but which in reality constitute the action of a single State or a minority group.

Following the close of hostilities after WW II, terrorism was not on the priority of the international agenda. Thus, states dealt with the phenomenon at the domestic level and on the basis of domestic legislation. There are two facets to the existence of this approach in its formative years besides the regulation by states of terrorist acts taking place on their territory. The other facet concerns those states that were faced with determining the criminal culpability of an alien accused of terrorist activity in his or her country of nationality – such cases usually involved requests for extradition to the country of nationality or the territorial state. States faced with such extradition requests had to determine within the boundaries of their own domestic legal systems whether the alleged offender was really susceptible to prosecution in a foreign jurisdiction. It must be made clear that until the promulgation of the first anti-terrorist conventions in the mid-1960's, the only other internationally binding instruments available were bilateral extradition treaties, but most of these before the 1960's made no provision for terrorist offences. Thus, a unilateral internal model developed with regard to the practice of requested States by which the determination of guilt of the accused offender was to be made on common sense and legal criteria of the Forum state. To this end, several principles were established, which although were applied under the same name across the globe, they were in fact predicated on criteria pertinent to each state. Chief among these is the political offence exception to terrorism. During the same time, i.e. slightly prior to the mid-1960's, many bilateral extradition treaties are revised to take account of terrorism, but in practice the factual determination of the principles contained therein are subject to judicial determination and the political offence exception is indeed prevalent. Nonetheless, the existence of such bilateral agreements suggests a dispersion of legal obligations from the unilateral

internal model as the sole model, to the seed of what has become the '*inter-State suppressionist co-operative*' model. Whereas political violence until the mid 1960's had an international ideological basis, it was nonetheless spatially limited, and as such it was dealt with on the basis of the unilateral domestic model [i.e. on a purely domestic basis in both its legal and enforcement dimensions]. From the 1960's until the early 1970's political violence began manifesting itself beyond international frontiers and threatened the security of civil aviation. The introduction of this international element alone shifted the counter-terrorism model from a fully unilateral domestic to an *inter-state co-operation model.*

Through my examination of the evolution of anti-terrorist policy, it became evident from the late 1950's that the newly launched airline industry was in danger of collapse unless action was taken to prevent terrorist action. For the purposes of this thesis, the adoption of the 1963 Tokyo is significant in two respects: a) because it marks a normative shift of models, from the unilateral internal to a much more inter-State suppressionist, and; b) because it is recognised that no State alone can expect to combat terrorism, since in this new era the movement of goods and people across international frontiers implicates the cooperation of multiple jurisdictions. Although by this time it became evident that a comprehensive convention on terrorism was impossible to achieve, the inter-State suppressionist model proliferated through the conclusion of further thematic multilateral anti-terrorist conventions between the early to late 1970's. The inter-State model of this period, as reflected in the new multilateral conventions, sought to restrict somewhat the freedom of domestic institutions – particularly of courts and the decision-making power of justice ministers to pass fate on extradition requests – in challenging terrorist acts on the basis of the offender's motive. This initiative was not especially successful, mainly because the majority of ideological violence in the 1970's was internal and deemed to fall within the ambit of national liberation, while it should not be forgotten that the recent desalinization struggle had left a strong imprint across the globe. Particular mention should be made to the fact that during the 1970's the General Assembly of the United Nations, at a time when the Assembly was dominated by developing and newly decolorized States, attempted to address the problem of root causes. These discussions and relevant resolutions in the end did not culminate into any particular action on the part of the UN, but it is worthy of mention as the only instance of discussion of a truly preventive inter-State approach. With the collapse of the Soviet Union and the end of the Cold War the issue of terrorism shifted from the General Assembly and the various specialized agencies of the UN to the

Security Council. This was the start of a new model – and parallel to the ones already outlined above – which is inter-State in character, but which is much more centralized and less consensus-based than its other inter-State counterpart. The adoption of the Bombing convention and the Financing of Terrorism conventions represented a *more effective rendition of the suppressionist* model against terrorism as both of them contain an expanded, wide range of obligations on member states. One of the innovative elements of the conventions is that they threat the offences prescribed therein as non-political offences for the purpose of extradition. The legal effect of this provision is that a normal defence that would be available to a fugitive offender to plead that an act was committed under political motivation is denied in the case of extradition proceedings relating to a terrorist bombing. The provision recognizes that where there is recourse to indiscriminate violence against civilians, then the offender is not entitled to the protection provided by the laws governing extradition. We can therefore detect that the main theme underlying the Conventions is the abandonment of particular safeguards otherwise granted to the accused under domestic law and prior anti-terrorist conventions. Consequently, the legal instruments developed by the United Nations and Regional Inter-Governmental Organizations have been ad hoc. Each convention deals with a specific subject-matter and almost always as a result of a crisis or a spectacular incident of terror-violence. For example, highjackings and sabotage of civilian aircraft during the 1960s and 1970s prompted the United Nations to adopt four international conventions dealing with the suppression of unlawful seizure of aircrafts, unlawful acts committed upon aircraft, unlawful acts against the safety of civil aviation, and unlawful acts of violence at airports. Similarly, a rash of assassinations and kidnapping of diplomats during the 1960s and 1970s brought about the adoption of a convention concerning the protection of diplomats. Later, as a result of attacks upon United Nations personnel, a convention was adopted to protect United Nations and Associated Personnel. The late 1960s and early 1970s also witnessed a rapid increase in the kidnapping of civilian hostages for ransom, thus bringing about the adoption of a convention against the taking of hostages. Conventions concerning terrorist acts against maritime activities followed the 1985 seizure of the Italian vessel Achille Lauro on the high seas. More recently, the American Embassy bombings in Kenya and Tanzania prompted the 1998 adoption of a convention criminalizing the bombing of government facilities.

Notably all the anti-terrorism conventions adopt a suppressionist approach. Throughout this thesis I have not identified an inter-State preventive approach. For sure, if one goes through relevant Security

Council resolutions and anti-terrorist treaties the term 'prevention' figures prominently and distinguishable from its counterpart 'punish'. For the purposes of this thesis I have taken the view that for a particular criminal justice policy to qualify as preventive it must target the root causes of a phenomenon, i.e. before it is conceived as a concrete idea in the mind of the perpetrators. Where it is conceived as an idea and it is discussed for the purposes of perpetration, the offence is at the planning stage and it already constitutes a criminal offence. My research of the various legal instruments and criminal justice policy literature has revealed that the term 'prevent' designates the latter and is not employed to tackle root causes. Therefore, I have included the planning stages of terrorist offences – even where they take a long time to mature into the ultimate offence – within the suppressionist framework.

The events of September 11 seem to have changed the prevailing attitude towards terrorism. Considerable debates have taken place on whether there has been a paradigmatic shift in the field of *jus ad bellum*. As regards the right to employ armed force against terrorists, I have ascertained that Resolution 1368 can only be interpreted to encompass the particular context of the 9/11 attacks, i.e. that Al-Qaeda was in such close proximity to the Taleban regime, which was the effective government of Afghanistan at the time, that the force authorized under Resolution 1368 was against Afghanistan and not against a terrorist group as such. This result is confirmed by the reaction of States subsequent to the adoption of the Resolution and the judgment of the International Court of Justice (ICJ) in its Advisory Opinion in the *Palestinian Wall* case in 2004. This conclusion is also premised on the principle of non-intervention and the respect of the sovereignty of nations, since in those cases where a terrorist group has forced itself upon the territory of a State and using part of that territory for terrorist activities, it defies the rationale of Article 51 UN Charter to justify recourse to force on the basis of that Article. Rather, in such cases it should be the Security Council acting unanimously that should decide when and how armed force is to be used. I am thus of the opinion that armed force against terrorist attacks may be employed only under the strict context-based example of the 9/11 attacks. The magnitude of the atrocities committed in September 11 and the military response against Afghanistan along with the support received from the whole international community shows that terrorism may be characterized as an armed attack giving rise to self-defence but it must satisfy the scale and effect test before it can be characterized as such. The nature of the organization, the atrocities caused by the degree to which they

represent a general campaign and the method used will all bear on whether it is deemed to have acquired the level of intensity.

For one thing, we have seen the approach established by Security Council Resolution 1368 – although restrictive and by no means of a general character - and referring to the application of the individual or collective right of self-defence in cases akin to the events of 9/11 (reactive). Secondly, although the Security Council took no parallel (to Resolution 1368) Chapter VII action in relation to the Afghan campaign, it has indicated the possibility of doing so in the future should the need arise. Council Resolutions 1377 and 1378 have emphasized the Council's determination that terrorism runs contrary to the purposes and principles of the United Nations Charter, and that within this legal framework every attempt should be made to root it out[1]. This statement is very significant because it brings terrorism within the legal sphere of the UN Charter, and particularly Articles 2(4), 51 and Chapter VII. I should make clear, however, that the approximation of terrorism to the above mentioned UN Charter provisions in the language of Council resolutions does not mean that we can freely substitute the word 'State' with that of 'terrorist organization'. Rather, at present there exists only a very narrowly defined schema for assimilating terrorist attacks to the UN Charter framework; namely, the specific context of Council Resolution 1368 and the possibility of relying on Article 51 UN Charter where the harbouring State is an agent of the terrorist organization. It should not surprise us that in the light of such vagueness and uncertain language, the General Assembly did not speak in the language of self-defence, following the events of 9/11, contrary to Council Resolution 1368[2]. Nonetheless, the language employed by the Council in Resolutions such as 1377 and 1378 may provide a basic precedent for authorising the use of armed force against terrorism in the future, if and when the requisite consensus can be secured. But in every case, it is clear that we are referring to a suppressionist model, since we

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[1] SC Res. 1377 (12 Nov. 2001); SC Res. 1378 (14 Nov. 2001).

[2] See GA Res. 56/1 (18 Sep. 2001).

have seen the lack of even the slightest support for a Security Council-backed pre-emptive use of force against terrorists.

In the case where terrorism because of its gravity and degree of violence employed can be qualified as armed attack self-defence is always limited by article 51 of the UN Charter and customary international law, such as necessity and proportionality. The latter in particular should be interpreted in the sense that the use of force in self-defence must be committed with the aim of fending off the armed attack. In the case where an attack is carried out by means of acts of terrorism, the limit of proportionality implies that the victim state may use force in order to target terrorists bases, training grounds etc. but self-defence cannot consist in the massive and generalised use of armed force aimed at defeating the state accused of being responsible for the acts of terrorism.

It is clear that the right is not an open right, which can be applied according to the defender's views. Self-defence has to answer to the rules of international law in particular the principles of necessity, proportionality and immediacy as well as the restrictions of article 51. Although Article 51 addresses some of the questions about the use of force, it does not define exactly the circumstances when states can, individually or collectively, legitimately use force to counter an attack that they perceive to be imminent. Because of the nature of current and pending international security threats, more precision is urgently needed to establish a common understanding of legally justifiable action in the face of imminent threats, even though specific cases may vary in their technical details. Resolving this question would not only help reduce tension within the international community, but it would also help the Security Council establish guidelines to make collective decisions on security actions under Chapter VII. A cautious approach to anticipatory military action is essential to avoid abuse. Whatever solution or guidance the international community undertakes to reach a common understanding of *jus ad bellum* on anticipatory military action taken collectively or individually, such action can succeed only if it is firmly rooted in a clear international law order. The events of September 11 brought about a significant loosening of the legal regime with regards to the use of force. However, time can only tell whether those potential loosening is necessary responses to contemporary terrorist threats.

The unilateralism expressed by the National Security Strategy as evidence of a pre-emptive use of force provoked reactions by the whole international community. Such reactions are important to the extent that they demonstrate the rejection of unilateralism and the support for a collective security system.

Thus, the pre-emptive model does not constitute a model of any sort. As the Secretary General of the UN pointed out in the opening of the 58th session of the General Assembly this doctrine of pre-emptive self-defence clashes with the UN Charter. If the global anti-terrorist struggle (including the development of an integrated political and security strategy to combat terrorism) is left to the nation-states alone, the world will be confronted with the real danger of uncoordinated action by a multitude of sovereign actors. In such a scenario, each actor will define its strategies on the basis of an essentially *unilateral* threat assessment and may eventually carry out *pre-emptive measures* according to that threat assessment.

What became clear from this thesis is that terrorist organisations will continue to be defeated by detection and prosecution, which falls within the suppressionit model. Although that new standards are necessary to fight terrorism at the international level and mechanisms that watch the observance of such standards, such as the Counter-Terrorism Committee, the war against terrorism seems to continue materialise and revolve around counter-intelligence operations that can deal with the financing of terrorism rather that than war in the technical sense of the word. In fact, the 'war on terror' is clearly not an armed conflict at all. It consists of a multi-faceted counter-terrorism campaign, some aspects of which involve the use of military force, most of it carried out in States where there is no armed conflict. My conclusions as to the application of the Jus ad Bello and Jus in Bello in the context of international terrorism indicate that the contemporary counter-terrorism model is indeed one based not on military action but on inter-state co-operation. The strict regime reinforced by Council resolutions and further monitored by a subsidiary Council organ, the Counter-Terrorism Committee is indeed evidence of the preferable counter-terrorism approach. In the field of mutual legal assistance and exchange of information and intelligence, Resolution 1373 imposes obligations that are not susceptible to unfettered unilateral action but come under close Council observance, thus underlying a *centralised Security Council model.*

However, the implications of Resolution 1373 were felt in all aspects of public life, as well as private, because every registered financial institution is now under an obligation to detect suspected funds and conform to similar demands made by the Council and other agencies. These obligations go far beyond what would have been expected of individual States ratifying the 2000 Terrorist Financing Convention. It is evident, therefore, that we no longer have a paradigmatic shift from the pure inter-State

suppressionist model to the more centralized Security Council model. However, this is not the prevalent model in all aspects of counter-terrorism policy, but mainly in the fields of bombings and terrorist financing. As a result, a large number of States have viewed their obligations under Resolution 1373 as providing an exception to their human rights obligations under international law. In particular, model-countries such as Sweden, have not found it problematic to illegally render suspected persons to States that are well-known for their atrocious human rights record without even having substantiated charges against such accused persons. Similarly, other countries, and particularly the USA, have lost little sleep over illegally rendering suspected persons to countries such as Egypt, Syria and Jordan for indefinite periods of time with the certain knowledge that such persons will be subjected to torture and other cruel and inhuman treatment. The frightening aspect of this trend is the fact that most of these countries now proclaim this to official and not merely clandestine and 'unauthorized' activity, as would have been the case prior to 9/11. We are, therefore, witnessing a paradigmatic shift from an inter-State cooperation premised on treaty obligations, to an inter-State model based on informal structures – officially this is explained on the basis of Resolution 1373 – with a significant effect on human rights. This is an extremely dangerous trend that needs to be challenged judicially and politically and it is appalling that individual EU countries are part of such abuses. Indeed, the UN Human Rights Committee and other domestic courts have made it clear that there does not need to be any conflict between the obligations contained in Resolution 1373 and inter-State human rights obligations. As Professor Bassiouni notes ' there is no internationally agreed upon methodology for the identification and appraisal of what is commonly referred to as terrorism, including causes, strategies, goals and outcomes of the conduct in question and those who perpetuate it. There is also no international consensus as to the appropriate reactive strategies of states and the international community, their values, goals and outcomes. All of this makes it difficult to identify what is sought to be prevented and controlled, why and how. As the world is coming to grips with a changed security environment, it is clear that the dangers posed by private actors, in particular terrorist groups, are no longer isolated issues easily to be dealt with within the national context. In this era of globalization and technological innovation, states indeed have no choice but to join efforts and strive towards a 'new security consensus'. Such a consensus is revealed by the development of the centralized Security Council model of inter-state co-operation.

In the process of deconstructing the contemporary counter-terrorism models it became evident that the current terrorist threats have urged a number of states to deal with terrorism as a phenomenon irrespectively of any ideological or political possible justifications. Among the main tools is the fight against terrorism has been international co-operation through judicial co-operation, police operations and the implementation of anti-terrorism conventions. It became evident during the course of my research that there is now a strong legal framework capable of addressing the modern manifestations of terrorism. However, it further became evident that states often selectively apply the law, driven by their national interests and by the policy agenda of the moment. In case the law is unclear, such uncertainty allows powerful states to act unilaterally and undermine the collective security system. The challenge ahead is to enforce the existing international norms. The commitment of the international community to clarify and strengthen international law will play the major factor in fight against terrorism. Therefore, what is mostly needed in the fight against terrorism is not the development of new norms but the enforcement and consistent application of the existing international norms.

Where do we go from here? I have identified a number of current counter-terrorism models, such as the inter-state cooperation and the Security Council centralised and the unilateral external. Where there exists a conflict between any of these the relevant Security Council models will prevail on the basis of Article 103 UN Charter, and in the case of conflicts between the other models one can only presume that a model can only invalidate another if it has been given the normative capacity to do so by the States concerned (i.e. a new treaty cannot invalidate the effects for State A with regard to an older treaty, unless State A expressly denounces the older treaty. Obviously, States parties to the old treaty will be affected by the denunciation of the old treaty by State A, and State A will have to deal with its relationship with these States too). The most significant, and from a legal point of view artificial, conflict is that between the recent Security Council model over and above fundamental human rights concerns. Although such violations of human rights form part of unilateral internal and bilateral inter-State model they are in fact predicated, for countries other than the USA, on Security Council resolutions. The real danger is that if this practice becomes endemic and widespread it may receive a normative character and thus turn into a model with catastrophic consequences. It is hoped that future action will avert this doomsday scenario.

Certainly the applicable rules in the fight against terrorism both at national and international level need to become clearer. There is not evidence however suggesting a major reconstructing of international law dealing with terrorism. What is lying ahead is the challenge of effective enforcement of existing norms, which needs to be met. And that would in turn help push international law further from the concepts and methods of international law of co-existence - which purports to maintain the co-existence between antagonistic units, assumed to have contradictory interests- towards the more co-operative vision and model of international law of co-operation based on common interests.

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